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No.

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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MICHAEL ANTHONY TAYLOR,

Petitioner,

—V.—

STATE OF MISSOURI,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF MISSOURI

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

CAPITAL CASE

1. Whether a Missouri statute—which is similar to the statutes of five other states—denying the right to have a jury determine aggravating factors following a capital murder guilty plea violates the Sixth and Fourteenth Amendments to the United States Constitution. *See Blakely v. Washington*, 542 U.S. 296 (2004); *Ring v. Arizona*, 536 U.S. 584 (2002); *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

2. Whether the Missouri Supreme Court, which has held that *Ring v. Arizona*, 536 U.S. 584 (2002) applies retroactively on state law grounds to death row inmates, *see Missouri v. Whitfield*, 107 S.W.3d 253 (Mo. 2003), violated petitioner's due process rights under the Fourteenth Amendment and also denied him the meaningful appellate review required under the Fourteenth Amendment by failing to apply *Whitfield's* protections to petitioner.

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OPINIONS BELOW

The decision of the Missouri Supreme Court affirming petitioner's sentence of death is published at *Missouri v. Taylor*, 929 S.W.2d 209 (Mo. 1996) (en banc) and included in Petitioner's Appendix at 167a–200a.

The November 25, 2008 order of the Missouri Supreme Court denying petitioner's Motion to Recall the Mandate is unpublished. See Pet. App. 238a.

STATEMENT OF JURISDICTION

The Missouri Supreme Court issued its order denying petitioner's Motion to Recall the Mandate on November 25, 2008. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner relies on the Due Process Clause of the Fourteenth Amendment, the Right to Jury Clause of the Sixth Amendment, and Missouri Revised Statute § 565.006.2, the pertinent texts of which follow:

United States Constitution, Amend. VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law,

and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

**United States Constitution,
Amend. XIV, § 1:**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Mo. Rev. Stat. § 565.006.2:

Waiver of jury trial permitted, when . . .

2. No defendant who pleads guilty to a homicide offense or who is found guilty of a homicide offense after trial to the court without a jury shall be permitted a trial by jury on the issue of the punishment to be imposed, except by agreement of the state.

STATEMENT OF THE CASE

A. The Initial Trial Court Proceedings

On February 8, 1991, Michael Anthony Taylor ("Mr. Taylor") pleaded guilty to first degree murder, armed criminal action, kidnapping, and forcible rape. The State of Missouri sought the death penalty. Under then-existing—and *current*—Missouri law, "No defendant who pleads guilty to a homicide offense . . . shall be permitted a trial by jury on the issue of the punishment to be imposed, except by agreement of the state." Mo. Rev. Stat. § 565.006.2 (2008). Absent the State's consent, only a judge could conduct the statutorily-mandated, four-step factfinding required for the imposition of the death penalty. *See id.* § 565.030.4; *see also Missouri v. Whitfield*, 107 S.W.3d 253, 256 (Mo. 2003) (outlining the required four-step process).

The Honorable Alvin C. Randall presided over Mr. Taylor's plea hearing, during which defense counsel and the State explained to Mr. Taylor that if he pleaded guilty, the judge would decide his sentence. Pet. App. 88a–93a.

The State: Do you understand that the Judge might very well sentence you to the death penalty in this case?

Mr. Taylor: Yes, I do.

The State: Do you know that by pleading guilty here today that instead of 12 people deciding, there will only be one

person deciding, this
Judge: do you understand
that?

Mr. Taylor: Yes, I do.

Id. at 92a.

On May 3, 1991, Judge Randall sentenced Mr. Taylor to death. Pet. App. 81a–87a. First, Judge Randall found, beyond a reasonable doubt, the presence of at least five statutory aggravating circumstances and two non-statutory aggravating circumstances. *Id.* at 82a–84a. Second, he found the evidence relating to the murder and the aggravating factors were sufficient to warrant the imposition of the death penalty. *Id.* at 84a. Third, he found one mitigating circumstance but did not find it sufficient to outweigh the aggravating circumstances. Finally, Judge Randall found “that the sentence of death is the only appropriate punishment in this case and for this defendant.” *Id.* at 85a.

B. Remand for New Penalty Phase

Mr. Taylor filed for post-conviction relief under Mo. Rule Crim. Pro. 24.035, challenging his guilty plea and sentence. During a hearing before Judge Robert H. Dierker, Jr. of the Circuit Court of St. Louis County, Mr. Taylor presented evidence that Judge Randall had been impaired by alcohol at the time of sentencing¹ and argued that his plea was involuntary because his plea counsel had been ineffective. Pet. App. 46a–48a.

¹ The Missouri Supreme Court appointed Special Judge Dierker after all of Judge Randall’s colleagues in the Sixteenth Judicial Circuit were recused. Pet. App. 16a.

Judge Dierker ruled against Mr. Taylor who then appealed that decision to the Missouri Supreme Court. Without opinion, on June 29, 1993, the Missouri Supreme Court entered the following order: "Judgement vacated. Cause remanded for new penalty hearing, imposition of sentence, and entry of new judgement." Pet. App. 1a.

Upon remand, Mr. Taylor moved to withdraw his guilty plea. Pet. App. 94a-96a. He also moved for a jury trial on the issue of punishment. Pet. App. 97a-98a; *see also* Pet. App. 99a-106a (setting out suggestions in support of these motions). These motions were denied. Pet. App. 107a-111a; 9a-10a; 7a-8a. Mr. Taylor filed a Petition for a Writ of Prohibition to the Missouri Court of Appeals, Western District at Kansas City, and then to the Missouri Supreme Court. Pet. App. 5a-6a; 112a-120a. He argued that the trial court had erred in refusing to let him withdraw his plea. Under Mo. Rule Crim. Pro. 29.07(d), a defendant may move to withdraw a plea of guilty before sentence is imposed. Mr. Taylor also argued that the denial of his motion for a jury trial on the issue of punishment was "a denial of [his] Constitutional Rights to a jury trial under the Missouri and U.S. Constitutions." Pet. App. 115a-116a. Following denial of his Petition, Mr. Taylor was again sentenced by a judge, acting as the sole factfinder.

On June 17, 1994, the Honorable H. Michael Coburn sentenced Mr. Taylor to death for murder after undertaking the four-step factfinding process dictated by Mo. Rev. Stat. § 565.030.4. First, Judge Coburn found, beyond a reasonable doubt, six statutory aggravating factors and three non-statutory aggravating factors. Pet. App. 121a-128a.

Second, he found one mitigating circumstance. *Id.* at 125a. Third, he found that the mitigating circumstance did not outweigh the aggravating circumstance. *Id.* at 126a. Finally, he found that the aggravating circumstances warranted the imposition of the death penalty. *Id.*

On appeal, Mr. Taylor argued that the trial court erred in refusing to allow a jury to be empanelled for the second penalty phase trial because he had a constitutional right to have a jury assess the aggravating factors. Pet. App. 141a-147a. He relied on Mo. Rev. Stat. § 565.035.5(3), which allowed the Missouri Supreme Court, when reviewing death sentences, to “[s]et the sentence aside and remand the case for retrial of the punishment hearing,” further providing that in such a case, “[a] new jury shall be selected or a jury may be waived by agreement of both parties” Affirming the result below, the Missouri Supreme Court stated that:

Initially, we must note the right to a jury on the issue of punishment in a first degree murder case is created by statute. *State v. Hunter*, 840 S.W.2d 850, 863 (Mo. banc 1992), *cert. denied*, 509 U.S. 926, 113 S.Ct. 3047, 125 L.Ed.2d 732 (1993) (citing *Spaziano v. Florida*, 468 U.S. 447, 460, 104 S.Ct. 3154, 3162, 82 L.Ed.2d 340 (1984)). “A defendant has no constitutional right to have a jury assess punishment.” *Id.* Furthermore, a defendant who pleads guilty is not permitted to have a jury trial on the issue of punishment without the State’s agreement. Section 565.006.2, RSMo 1994. Here, the State has not agreed to allow Taylor a

jury trial on the issue of punishment. As such, Taylor's reliance on section 565.035.5(3) is misplaced.

Section 565.035.5 provides the safeguard procedure for this Court to follow for independent review of all death sentences. Section 565.035.5(3) does not provide a defendant a right to a jury trial on the imposition of sentence where such a right did not exist prior to remand.

Missouri v. Taylor, 929 S.W.2d 209, 218-19 (Mo. 1996) (en banc) (emphasis added), *cert. denied*, 519 U.S. 1152 (1997).²

² Mr. Taylor subsequently filed a petition for writ of habeas corpus in the United States District Court for the Western District of Missouri. After the District Court denied the petition, the Eighth Circuit issued a certificate of appealability on two issues: "(1) whether the denial of Taylor's motion to withdraw his guilty plea because the plea judge and sentencing judge were not the same person violates his federal constitutional due process rights; and (2) whether the district court erred in ruling that Taylor's ineffective assistance of plea counsel claim was procedurally defaulted." *Taylor v. Bowersox*, 329 F.3d 963, 967 (8th Cir. 2003). The Eighth Circuit affirmed the District Court's denial of the writ, *id.* at 972, and this Court denied further review, 541 U.S. 947 (2004).

Mr. Taylor has continued to challenge the effectiveness of his court-appointed counsel. See *Taylor v. Missouri*, 254 S.W.3d 856 (2008), *cert. denied*, 2009 WL 160666 (U.S. Jan. 26, 2009). He has also challenged Missouri's implementation of its method of execution as cruel and unusual under the Eighth Amendment. See *Taylor v. Crawford*, 487 F.3d 1072 (8th Cir. 2007), *cert. denied*, 128 S.Ct. 2047 (2008).

On January 3, 2006, the Missouri Supreme Court set February 1, 2006 as Mr. Taylor's execution date. Mr. Taylor's execution was stayed pending the resolution of *Missouri ex rel. Nixon re Daugherty*, 186 S.W.3d 253 (Mo. 2006), *cert.*

C. The Missouri Supreme Court Applies *Ring* Retroactively Yet Refuses to Recall its Mandate in Mr. Taylor's Case

In 2003, the Missouri Supreme Court decided *Missouri v. Whitfield*, 107 S.W.3d 253 (Mo. 2003) (en banc). In 1994, a jury had convicted Joseph Whitfield of first-degree murder but was split during the penalty phase, voting 11 to 1 to impose life imprisonment. *Id.* at 256. A judge then took over the penalty phase and imposed the death sentence. *Id.*

In *Ring v. Arizona*, this Court held that the Sixth Amendment entitles "[c]apital defendants . . . to a jury determination on any fact on which the legislature conditions an increase in their maximum punishment." 536 U.S. 584, 589 (2002). Whitfield filed a motion to recall the mandate in his case based on *Ring*. The Missouri Supreme Court agreed to recall the mandate by applying *Ring* retroactively to Mr. Whitfield. The court recognized that "states may apply new constitutional standards 'in a broader range of cases than is required'" by this Court's decisions regarding retroactivity. *Id.* at 267 (citation omitted). According to the Missouri Supreme Court,

Mr. Whitfield's right under the Sixth and Fourteenth Amendments to a jury determination of the facts rendering him eligible for the death penalty was violated, as his death sentence was entered not

denied, *Taylor v. Missouri*, 549 U.S. 997 (2006). It has not been rescheduled.

based on a jury finding of any fact, but rather entirely on the judge's findings.

Id. at 264.

Relying on *Whitfield* and *Ring*, Mr. Taylor filed a motion to recall the mandate in his case.³ Pet. App. 201a–211a. Without explanation the Missouri Supreme Court denied the motion. *Id.* at 213a. This Court denied discretionary review. *Taylor v. Missouri*, 546 U.S. 1036 (2005).

D. Relying on *Blakely*, Mr. Taylor Again Moves to Recall the Mandate

In *Blakely v. Washington*, 542 U.S. 296 (2004), this Court extended the protections of *Ring* to defendants who plead guilty. In response, Mr. Taylor moved again to recall the mandate in his case. Pet. App. 214a–237a. His motion stated:

Michael Taylor was sentenced to death by a judge who made the fact findings required to establish eligibility for a sentence of death despite that Mr. Taylor clearly invoked his right to have a jury make those factual findings. No a [sic] jury ever unanimously found the facts necessary to make Mr. Taylor eligible for

³ Recalling the mandate is the proper jurisdictional mechanism to vindicate Mr. Taylor's constitutional rights. The Missouri Supreme Court has held that "[a] mandate may be recalled in order to remedy a deprivation of the federal constitutional rights of a criminal defendant" and that "[s]uch a motion may also be employed when the decision of a lower appellate court directly conflicts with a decision of the United States Supreme Court upholding the rights of the accused." *Missouri v. Thompson*, 659 S.W.2d 766, 769 (Mo. 1983) (en banc).

the death penalty pursuant to § 565.030 RSMo as required by the Sixth and Fourteenth Amendments to the United States Constitution. The Missouri Supreme Court opinion in [*Missouri*] v. *Taylor*, 929 S.W.2d 209 (Mo. banc. 1996) upholding this result conflicts with the United States Supreme Court's holdings in *Blakely*, *Ring* and *Apprendi* and the Sixth and Fourteenth Amendments to the United States Constitution.

Id. 216a.

Mr. Taylor further argued that *Blakely* should be applied retroactively in Missouri under the Missouri Supreme Court's reasoning in *Whitfield*. *Id.* at 223a-224a.

On November 25, 2008, the Missouri Supreme Court issued a one sentence order: "Appellant's motion to recall the mandate overruled." Pet. App. 238a-239a. This Petition for a Writ of Certiorari follows.

REASONS FOR GRANTING THE PETITION

This case comes before the Court on two questions: (1) whether a Missouri Statute that automatically and conclusively, deems a capital defendant to have waived his or her right to have a jury determine aggravating factors upon entry of a guilty plea violates the Sixth Amendment, as recognized in *Blakely v. Washington*, 542 U.S. 296 (2004); and (2) whether the Missouri courts,

in failing to apply *Missouri v. Whitfield*, 107 S.W.3d 253 (Mo. 2003) (applying *Ring v. Arizona*, 536 U.S. 584 (2002) retroactively under state law), violated petitioner's due process rights. Both questions should be answered in the affirmative. The Missouri statute is on its face a clear violation of the Sixth Amendment and *Blakely*. Nor did Mr. Taylor ever knowingly waive this right. There is a split among state courts as to whether such statutes violate the Sixth Amendment which this Court should resolve.

The denial of petitioner's due process right is equally compelling. The Missouri Supreme Court already has held the right to a jury trial in the penalty phase is retroactive and therefore applicable to petitioner. That Court's failure to recall the mandate under such circumstances warrants reversal and remand.

A. The Missouri Statute at Issue Violates the Sixth Amendment and is Unconstitutional Under *Blakely*

1. *The Sixth Amendment as Interpreted by Blakely Prohibits States From Denying Jury Determinations of Aggravating Factors When Defendants Plead Guilty to a Crime*

Mr. Taylor pleaded guilty to capital murder in 1991 and was sentenced to death by the trial court. On appeal, the Missouri Supreme Court remanded based on a record that included the fact that the sentencing judge was impaired. On remand, Taylor demanded that a jury, not a judge, determine any aggravating factors. Pet. App. 97a-98a; 99a-106a. This request was denied

because Missouri Annotated Statute § 565.006.2, expressly precludes capital defendants from having a jury in the penalty phase if they plead guilty to capital murder:

No defendant who pleads guilty to a homicide offense or who is found guilty of a homicide offense after trial to the court without a jury shall be permitted a trial by jury on the issue of the punishment to be imposed, except by agreement of the state.

Mo. Ann. Stat. § 565.006.2 (2008).

On its face, this statute violates the Sixth and Fourteenth Amendments as interpreted by this Court in *Blakely*, 542 U.S. 296. *Blakely* is the culmination of this Court's rulings over the past ten years recognizing the constitutional importance of a defendant's right to a jury determination of sentencing enhancements and aggravating factors. See *Apprendi*, 530 U.S. 466 (holding that under the Sixth Amendment, any fact other than a prior conviction which increases the penalty of a crime must be submitted to a jury and proven beyond a reasonable doubt); *Ring*, 536 U.S. 584 (holding that capital defendants are entitled to jury determination of aggravating factors); *Jones v. United States*, 526 U.S. 227, 252-53 (1999) (Stevens, J., concurring) ("[I] am convinced that it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt."); *id.* at 253

(Scalia, J., concurring) (“[I]t is unconstitutional to remove from the jury the assessment of facts that alter the congressionally prescribed range of penalties to which a criminal defendant is exposed.”); see also *United States v. Booker*, 543 U.S. 220 (2005) (applying *Blakely*’s holding to the federal sentencing guidelines); *Cunningham v. California*, 549 U.S. 270 (2007).

In *Ring*, this Court recognized that capital defendants “are entitled a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.” *Ring*, 536 U.S. at 589. The defendant in *Ring* was convicted by a jury of first degree capital murder in the course of an armed robbery. *Id.* Arizona law at that time required the “court alone” to “make all factual determinations” of aggravating and mitigating factors in determining whether to sentence the defendant to death. *Id.* at 592.

This Court held the Arizona statute unconstitutional under its Sixth Amendment jurisprudence. The jury—and not the judge—must determine the facts necessary to impose a sentence of death:

The Sixth Amendment jury trial right . . . does not turn on the relative rationality, fairness, or efficiency of potential factfinders. Entrusting to a judge the finding of facts necessary to support a death sentence might be an admirably fair and efficient scheme of criminal justice designed for a society that is prepared to leave criminal justice to the State. The founders of the American Republic were not prepared to leave it to

the State, which is why the jury-trial guarantee was one of the least controversial provisions of the Bill of Rights. It has never been efficient; but it has always been free. In any event, the superiority of judicial fact-finding in capital cases is far from evident. Unlike Arizona, the great majority of States responded to this Court's Eighth Amendment decisions requiring the presence of aggravating circumstances in capital cases by entrusting those determinations to the jury.

Id. at 607-08 (internal quotation marks, alteration, citations, and footnotes omitted).

Ring, however, left unresolved an issue critical to a segment of capital defendants: whether under the Sixth Amendment, a State could bar defendants who plead guilty to a crime from having a jury determination of sentencing enhancements. This issue was resolved in *Blakely*, 542 U.S. 305-06.

In *Blakely*, this Court invalidated the State of Washington's sentencing guidelines because they permitted the trial judge, upon a plea of guilty, to enhance a defendant's sentence based on facts found by the judge by a preponderance of evidence. *Blakely*, 542 U.S. at 305-06. The Court noted that its "commitment to *Apprendi* in this context reflects not just respect for longstanding precedent, but the need to give intelligible content to the right of jury trial. That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure." *Id.*

The defendant in *Blakely* had pleaded guilty to second degree kidnapping involving domestic violence and the use of a firearm. *Id.* at 298-99. At his plea allocution, he did not admit facts that would have enhanced his punishment under a statute which permitted the trial judge to exceed the maximum sentence permitted for the kidnapping offense. *Id.* at 299. After a three-day hearing, the judge found that the defendant had "acted with 'deliberate cruelty'" under the aggravating statute and sentenced the defendant to thirty-seven months beyond the sentence under the plea agreement. *Id.* at 299-300.

This Court found that because the defendant did not admit to facts that would have enhanced his sentence beyond the facts for the underlying offense, the judge lacked the power to sentence him under the enhancement statute. "When a defendant pleads guilty, the State is free to seek judicial sentence enhancements so long as the defendant *either stipulates to the relevant facts or consents to judicial factfinding.*" *Id.* at 310 (emphasis added). The Court reasoned that "every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment." *Id.* at 313 (emphasis in original); see also *Booker*, 543 U.S. at 245 (extending *Blakely*'s holding to the federal Sentencing Guidelines and negating their mandatory nature); *Cunningham*, 549 U.S. 270 (holding that California's determinate sentencing law which assigned to the judge authority to find facts that exposed a defendant to an elevated "upper term" sentence was unconstitutional under *Apprendi* and its progeny).

Missouri's statutory scheme—similar to the sentencing guidelines in *Blakely*—denies defendants who plead guilty to capital murder the right to jury factfinding of aggravating factors necessary to impose the death sentence as guaranteed by the Sixth Amendment under *Blakely*. See Mo. Ann. Stat. § 565.006.2 (2008). As recognized in *Blakely*, the decision to plead guilty rather than require the State to prove the defendant's guilt should have no bearing on the right to jury in the penalty phase.

Under the Sixth Amendment, a criminal defendant should be able to preserve the right to take responsibility for his or her actions by pleading guilty to a crime, while reserving the right to have a jury find facts aggravating the crime and qualifying the defendant for a heightened sentence. By deeming a defendant to have waived the right to jury determination of aggravating factors upon a plea of guilty, Missouri and states with similar statutes effectively deter defendants from accepting responsibility for their crimes.

This Court has repeatedly noted that guilty pleas and acceptance of responsibility are important aspects of the United States' criminal justice system. See, e.g., *Santobello v. New York*, 404 U.S. 257, 260-61 (1971) (noting that guilty pleas are "an essential component of the administration of justice" that should be "encouraged"); *Brady v. United States*, 397 U.S. 742, 752 (1970) (noting the benefits of guilty pleas for both the defendant and the state); *Bradshaw v. Stumpf*, 545 U.S. 175, 186 (2005) (noting that the defendant's guilty plea allowed him to demonstrate "acceptance of responsibility"). Penalizing defen-

dants for pleading guilty by depriving them of their right to have a jury determine whether aggravating factors exist not only will result in fewer defendants accepting responsibility, it will also increase the burden on the justice system by increasing the number of cases that go to trial. *See Brady*, 397 U.S. at 752 (“[W]ith the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those in which there is a substantial issue of the defendant’s guilt or in which there is substantial doubt that the State can sustain its burden of proof.”).⁴

Blakely addresses the issue of petitioner’s right to jury trial head on—a guilty plea alone does not constitute a waiver of the right to jury fact-finding on death eligibility. *See Cunningham*, 549 U.S. at 283 (recognizing *Blakely*’s rejection of the state’s argument that the *Apprendi* rule did not apply because the guilty plea in *Blakely* provided the court with discretion to impose an exceptional sentence); *Blakely*, 542 U.S. at 304 (defendant pleaded guilty but still had a right to jury fact-finding during sentencing); *Apprendi*, 530 U.S. 466 (same).

⁴ See also Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 Yale L.J. 1969, 1975 (1992) (“When eight percent of defendants plead guilty, a given prosecutorial staff obtains five times the number of convictions it could achieve if all went to trial.”); Chief Justice Warren Burger, *The State of the Judiciary – 1970*, 56 A.B.A. J. 929, 931 (1970) (“The consequences of what may seem on its face a small percentage change in the rate of guilty pleas can be tremendous. A reduction from 90 percent to 80 percent in guilty pleas requires the assignment of twice the judicial manpower and facilities.”).

Accordingly, the Missouri statute at issue violates the Sixth Amendment and this Court's holding in *Blakely*.

2. *A Number of States Continue to Have Statutes Linking Waiver of the Right to Jury Determination of Aggravating Factors to Guilty Pleas*

Thirty-six states permit capital punishment. Nine states have or have had statutory schemes preserving the defendant's right to jury determination of aggravating contingent only upon a plea of not guilty. Similar to the statute in Missouri, statutes in Georgia, Oklahoma, Kansas and Wyoming force defendants who plead guilty to a crime to waive jury determination of aggravating factors. Ga. Code Ann. § 17-10-32 (2008); Okla. Stat. Ann. tit. 21, § 701.10 (2008); Kan. Stat. Ann. § 21-4624 (2008); Wyo. Stat. Ann. § 6-2-102 (2008). Courts in these four states have not yet ruled on whether these statutes are constitutional under the Sixth Amendment. These statutes are currently in full effect: forcing defendants to waive their right to jury determination of aggravating factors for exercising their right to plead guilty.

Courts in the remaining states have addressed the constitutionality of these statutes. Relying on *Blakely*, the Colorado Supreme Court recently held that section 18-1.3-1201(1)(a) of the Colorado Revised Statute violates a defendant's Sixth Amendment right to a jury. *See Colorado v. Montour*, 157 P.3d 489, 491 (Colo. 2007) (en banc). The Colorado statute provided:

Upon conviction of guilt of a defendant of a class 1 felony, the trial court shall conduct a separate sentencing hearing to determine whether the defendant should be sentenced to death or life imprisonment *If a trial jury was waived or if the defendant pled guilty, the hearing shall be conducted before the trial judge. The court shall instruct the defendant when waiving his or her right to a jury trial or when pleading guilty, that he or she is also waiving his or her right to a jury determination of the sentence at the sentencing hearing.*

Colo. Rev. Stat. Ann. § 18-1.3-1201(1)(a) (2008) (emphasis added).

The Colorado Supreme Court concluded that the state's statute was "facially unconstitutional because it fails to effect a knowing, voluntary, and intelligent waiver, as the waiver is automatic when a defendant pleads guilty." *Id.* at 492; *see also id.* at 495-496 (citing *Blakely*, 542 U.S. 296). In reaching this decision, the court stated that "[o]nce a capital defendant enters a guilty plea, he retains the Sixth Amendment right to jury sentencing on the facts essential to the determination of death eligibility." *Id.* at 498 (citing *Blakely*, 542 U.S. at 310).

The Supreme Court of South Dakota has come to the same conclusion. In *South Dakota v. Page*, the court concluded that any reading of state law "that would prevent a capital defendant from having the opportunity to have a sentencing hearing before a jury" had to be rejected as unconstitutional. 709 N.W.2d 739, 763 (S.D.

2006). However, the court determined that no violation of the Sixth Amendment had occurred after observing that the defendant had been given a separate and distinct opportunity to waive his right to a sentencing jury after his plea of guilty.⁵

In a case decided shortly after *Blakely*, the Supreme Court of South Carolina held that the protections encompassed by the *Apprendi* line of cases do not extend to defendants who waive a jury trial by pleading guilty, essentially concluding that a guilty plea is a valid waiver of both a guilt-phase jury and a penalty-phase jury. *South Carolina v. Downs*, 604 S.E.2d 377, 380 (S.C. 2004). The Indiana Supreme Court arrived at the same conclusion in *Leone v. Indiana*, a pre-*Blakely* case, declaring that the constitutional protections of *Apprendi* do not apply to defendants who plead guilty as the right to a jury at sentencing has been waived by the plea. 797 N.E.2d 743, 750 (Ind. 2003).

As the foregoing demonstrates, there remain a number of state statutory schemes that deny criminal defendants in death penalty cases the

⁵ In a similar vein, the Supreme Court of Georgia has held that "a defendant should be informed of the trial court's decision regarding who will impose sentence before he enters his guilty plea." *Browner v. Georgia*, 357 S.E.2d 559, 561 (Ga. 1987). The court reached "this conclusion because the question of who will impose sentence would be the primary concern of a defendant in a death penalty case in determining whether to enter a plea of guilty." *Id.* In so holding, the Court implicitly recognized that the decision to waive the right to a sentencing-phase jury cannot be wholly bound to the decision to plead guilty, but did rule on the constitutionality of the statute.

right to plead guilty to a crime while retaining the right to jury determination of aggravating factors.

A decision by this Court on the Missouri statute at issue should end any uncertainty regarding the impermissibility of statutory waivers of the constitutional right to a jury on aggravating factors in exchange for the ability to plead guilty.

3. *There Was No Effective Waiver of Petitioner's Right to a Jury Determination of Aggravating Factors*

At no time did Petitioner waive his right to have a jury find the aggravating circumstances required to subject him to a possible death sentence. A waiver was impossible when Petitioner pleaded guilty in 1991. Both then and now, Missouri law denied jury sentencing to defendants pleading guilty to homicide "except by agreement of the state." Mo. Rev. Stat. § 565.006.2. And in 1991, this Court had yet to announce the Sixth Amendment right to jury determination of aggravating circumstances, *see Ring*, 536 U.S. 584, that was later held to apply specifically to defendants who plead guilty, *see Blakely*, 542 U.S. 296. Moreover, Petitioner requested a jury in the penalty phase in 1993 after his sentence was vacated upon evidence that the prior trial court judge was impaired before imposing the death sentence. Pet. App. 97a-98a; 99a-106a.

The Supreme Court of Missouri expressly acknowledged Petitioner had no right to jury sentencing that he could have waived in deciding Petitioner's pre-*Ring/Blakely* appeal: "[J]ury sen-

tencing after a guilty plea is not a right for the defendant to waive, rather a privilege for the State to grant. Taylor did not waive sentencing by a jury because he could only obtain jury sentencing if the State agreed to it. The State did not agree." *Missouri v. Taylor*, 929 S.W.2d 209, 217 (Mo. 1996) (en banc).⁶

One cannot waive a right that one does not know he or she possesses in the first place. *Halbert v. Michigan*, 545 U.S. 605 (2005). The indigent petitioner in *Halbert* had pleaded *nolo contendere* to a crime but subsequently requested the appointment of counsel to seek leave to appeal. This Court rejected the State's argument that the petitioner had waived that right by pleading guilty: "At the time he entered his plea, Halbert, in common with other defendants convicted on their pleas, had no recognized right to appointed appellate counsel he could elect to forgo." *Id.* at 623. Likewise, Petitioner here had no recognized right to jury determination of aggravating circumstances when he pleaded guilty in 1991, and thus no such right that he "could elect to forgo."

By pleading guilty, Petitioner waived his right to be tried by a jury, but he did not—and could

⁶ The court's finding that the waiver was not "unknowing or involuntary" was again premised on the fact that under the Missouri Statute, Mr. Taylor had no right to jury sentencing. As a result "there was nothing of which to inform him." 929 S.W.2d at 217.

The court also rejected Petitioner's argument that he was entitled under a state statute to jury sentencing after his original death sentence was vacated because Mr. Taylor "never obtained nor possessed the right to a jury for imposition of punishment prior to this Court's remand order." *Id.* at 219.

not—waive a separate, then-nonexistent right to have a jury find aggravating circumstances. See *Colorado v. Montour*, 157 P.3d 489, 501 n.10 (Colo. 2007) (en banc) (“The court repeatedly instructed Montour that his guilty plea would result in his waiver of a jury trial on sentencing facts. . . . [But] Montour never made a knowing, intelligent, and voluntary waiver of his right to a jury trial on sentencing facts that was independent of his guilty plea.”); *Arizona v. Brown*, 129 P.3d 947, 951 (Ariz. 2006) (en banc) (“A defendant’s waiver of his Sixth Amendment rights must be knowing, voluntary, and intelligent. Such a waiver cannot be presumed when the defendant was neither informed of the right to jury trial on aggravating factors prior to his plea nor purported to waive such rights.”) (citation omitted).

The right to a jury in the penalty phase is distinct from the issue of whether the defendant had pleaded guilty. *Blakely v. Washington*, 542 U.S. at 296. Pleading guilty does not instantaneously wipe away all of one’s constitutional rights. See *Halbert* (indigent defendant who pleaded *nolo contendere* still had the right to appointed appellate counsel); *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (same); *United States v. Andis*, 333 F.3d 886, 890 (8th Cir. 2003) (en banc) (“The requirement that a plea agreement and waiver be entered into knowingly and voluntarily applies to each term of an agreement. For example, a defendant may knowingly and voluntarily enter into a plea agreement waiving the right to a jury trial, but nonetheless fail to have knowingly and voluntarily waived other rights—including appellate

rights."); *Montour*, 157 P.3d at 497-98 ("*Blakely* established the right to a jury trial during sentencing on all facts essential to punishment as a right independent from the right to a jury trial on the issue of guilt. . . . The guilty plea alone does not constitute a waiver of the right to jury fact-finding on death eligibility."); *Brown*, 129 P.3d at 951 (defendant who pleaded guilty still had the right to jury determination of aggravating circumstances).

Finally, the error in denying Petitioner a jury to determine aggravating circumstances was not harmless. "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967). The State cannot demonstrate that a jury empaneled to determine the existence of aggravating factors would have, beyond a reasonable doubt, sentenced Petitioner to death rather than life imprisonment.

In sum, Petitioner never waived his constitutional right to have a jury determine whether such aggravating circumstances existed as to justify a death sentence.

B. Because *Ring* Applies Retroactively in Missouri, the State Court's Denial of *Ring*'s Protections to Petitioner Violates the Due Process Clause of the Fourteenth Amendment

Ring has been given retroactive application on state collateral review by the Missouri Supreme

Court.⁷ See *Missouri v. Whitfield*, 107 S.W.3d 253 (Mo. 2003) (en banc). See also *Danforth v. Minnesota*, 128 S. Ct. 1029 (2008) (holding that the *Teague* doctrine does not constrain the authority of a state court to give retroactive effect to a new rule of federal constitutional law on collateral attack even when this Court has held that such a new rule will not be given retroactive effect on federal habeas review). In *Whitfield*, the defendant was tried and convicted of first-degree murder by a jury. *Id.* at 256. The jury could not, however, agree on punishment during the penalty phase and voted eleven to one in favor of life imprisonment. *Id.* In light of the deadlock, the trial judge, under Missouri capital procedure, proceeded to weigh the aggravating and mitigation circumstances and imposed a death sentence. *Id.*

The Missouri Supreme Court already had affirmed the sentence in a prior appeal. However, the defendant filed a motion to recall the mandate after this Court's decision in *Ring*. *Id.* The *Whitfield* court refused, as a matter of state law, to apply *Teague*'s narrow test to determine if *Ring* should apply retroactively. *Id.* at 268. Instead, under the broader test of *Linkletter-Stovall*, the court concluded that *Ring* should apply retroactively as to "those few Missouri death penalty cases that are no longer on direct appeal and in which the jury was unable to reach a ver-

⁷ In a 5-4 decision, this Court refused to apply *Ring* retroactively to death row inmates whose convictions and sentences were final at the time the Court decided *Ring*. *Schiro v. Summerlin*, 542 U.S. 348, 358-359 (2004) (applying *Teague v. Lane*, 489 U.S. 288 (1989)).

dict and the judge made the required factual determinations and imposed the death penalty." *Id.* at 268-69 (citing *Stovall v. Denno*, 388 U.S. 293 (1967) and *Linkletter v. Walker*, 381 U.S. 618 (1965)). The court recalled the mandate and resentenced the defendant to life imprisonment. *Id.* at 272.

Petitioner in this case was not permitted the right to jury determination of aggravating factors, just as in *Whitfield*. The failure of the Missouri courts to apply the holding in *Ring* to protect petitioner's Sixth Amendment right violates the Due Process Clause of the Fourteenth Amendment. See U.S. Const. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . ."); *Hicks v. Oklahoma*, 447 U.S. 343 (1980).

In *Hicks*, the petitioner, who had been previously convicted of two felonies, was charged with distribution of heroin. *Id.* at 344. In accordance with the state's "habitual offender statute," at trial members of the jury were instructed that "if they found the petitioner guilty, they shall assess the punishment at forty . . . years imprisonment." *Id.* at 344-45 (internal quotation marks and alterations omitted). The jury returned a verdict of guilty and imposed the mandatory minimum sentence of forty years imprisonment. *Id.* at 345. After petitioner's conviction, the provision of the habitual offender statute requiring the forty years minimum was declared unconstitutional by the state's appellate court in another case. *Id.* Petitioner sought benefit of this new development on direct appeal and moved to have his sen-

tence set aside. *Id.* Another state statute required that "a convicted defendant is entitled to have his punishment fixed by the jury." *Id.* at 343. The appellate court affirmed the sentence because petitioner "was not prejudiced by the impact of the invalid statute, since his sentence was within the range of punishment that could have been imposed in any event." *Id.* at 345 (footnote omitted). Petitioner sought a writ of certiorari from this Court.

This Court rejected the state's argument "that all that is involved in this case is the denial of a procedural right of exclusively state concern." *Id.* at 346. It held that "[w]here . . . a State has provided for the imposition of criminal punishment in the discretion of the trial jury, it is not correct to say that the defendant's interest in the exercise of that discretion is merely a matter of state procedural law." *Id.* The Court reasoned that the state cannot arbitrarily deprive the defendant of the expectation created by its laws:

The defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State.

Id. at 346 (citation omitted). The Court rejected as a "frail conjecture" the state's argument that "a jury *might* have imposed a sentence equally as harsh as that mandated by the invalid habitual offender provision. Such an arbitrary disregard of the petitioner's right to liberty is a denial of

due process of law." *Id.* (emphasis in original; footnote omitted).

Missouri law provides that a person whose conviction and sentence have been affirmed on appeal may move to recall the mandate when an intervening constitutional decision has rendered the basis for the appellate court's affirmance unsound. See *Whitfield*, 107 S.W.3d at 265; *Missouri v. Thompson*, 659 S.W.2d 766 (1983) (en banc); *Missouri v. McReynolds*, 581 S.W.2d 465 (Mo. Ct. App. 1979); *Missouri v. Nevels*, 581 S.W.2d 138 (Mo. App. 1979). A mandate "may be recalled in order to remedy a deprivation of the federal constitutional rights of a criminal defendant." *Thompson*, 659 S.W.2d at 769; see also *Whitfield*, 107 S.W.3d at 265 ("[O]ur courts have properly recognized that a mandate may be recalled in order to remedy a deprivation of the federal constitutional rights of a criminal defendant.") (quotation marks omitted).

This mechanism was used by the Missouri Supreme Court in *Whitfield* when it declared that the state statute requiring judge determination of sentencing factors was unconstitutional in light of this Court's holding in *Ring*. See *id.* at 265-66. The same mechanism and outcome should have been adopted here. *Ring* and *Whitfield* establish a "substantial and legitimate expectation" that the petitioner would be sentenced to life imprisonment because he was denied jury determination of aggravating factors in the sentencing phase of his criminal proceedings. *Hicks*, 447 U.S. at 346. The state court's summary order denying Mr. Taylor's motion to recall the mandate was in clear contradiction to

this Court's holding in *Ring*, as given retroactive effect by *Whitfield*, thereby denying petitioner due process of law.

It is well settled that the state's appellate procedures must comply with the Due Process Clause of the federal constitution's Fourteenth Amendment. *Evitts v. Lucey*, 469 U.S. 387, 393 (1985); see *Bell v. Lockhart*, 795 F.2d 655, 657 (8th Cir.1986). As this Court has held, the Due Process Clause protects individuals from government action that is arbitrary, *Daniels v. Williams*, 474 U.S. 327, 331 (1986), conscience-shocking, *Rochin v. California*, 342 U.S. 165, 172 (1952), oppressive in a constitutional sense, *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 196 (1989), or interferes with fundamental rights, *United States v. Salerno*, 481 U.S. 739, 746 (1987). This Court has also held that when a state "provides for an appeal to the State Supreme Court and on that appeal considers questions raised under the Federal Constitution, the proceedings in that court are a part of the process of law under which the petitioners' convictions must stand or fall." See *Cole v. Arkansas*, 333 U.S. 196, 201-02 (1948) (holding that petitioners were "denied safeguards guaranteed by due process of law—safeguards essential to liberty in a government dedicated to justice under law.").

A state appellate court cannot recognize a substantive right for one person, see *Whitfield*, 107 S.W.3d 253, and arbitrarily deny that right to another similarly situated person. See, e.g., *Gardner v. Florida*, (1977) 430 U.S. 349, 357-58 ("Death is a different kind of punishment from

any other which may be imposed in this country It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.”); *Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985) (“[T]he qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.”).

The need for ensuring that a criminal defendant secures a fair adjudication is particularly critical in the death penalty cases. On countless occasions, this Court has confirmed that states administering the death penalty must “ensure that the process is neutral and principled so as to guard against bias or caprice in the sentencing decision.” *E.g.*, *Tuilaepa v. California*, 512 U.S. 967, 973 (1994). To accomplish this, this Court has mandated “procedural protections . . . intended to ensure that the death penalty will be imposed in a consistent, rational manner.” *Lewis v. Jeffers*, 497 U.S. 764, 776 (1990) (quoting *Barclay v. Florida*, 463 U.S. 939, 960 (1983) (Stevens, J., concurring); see *Parker v. Dugger*, 498 U.S. 308, 321 (1991) (“We have emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally.”).

Due process requires the Missouri Supreme Court to apply its rules pertaining to motions to recall a mandate in a way that provides all petitioners falling under *Whitfield*’s protections a fair adjudication. *Cf. Evitts*, 469 U.S. at 405 (state

courts must provide "a fair opportunity to obtain an adjudication on the merits of [an] appeal.").

Rather than ensuring consistent and rational application of the death penalty, the procedure actually increases the arbitrary and capricious manner in which the death penalty is applied in Missouri. In *Whitfield*, the Missouri Supreme Court recalled the defendant's mandate by finding that he had been deprived of his Sixth Amendment's rights, as set forth in *Ring*. In this case, however, the court failed to apply *Ring* and *Blakely* to a comparable—if not more compelling—set of facts. Moreover, in the present case, the Missouri Supreme Court gave no explanation for why *Ring* and *Blakely* would be inapplicable here, yet applicable in *Whitfield*. Unlike the defendant in *Whitfield*, Taylor was never provided the initial right to a jury determination of the facts underlying his death sentence. See *Gardner v. Florida*, 430 U.S. 349, 358 (1977) ("It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on a reason rather than caprice or emotion.")

The summary denial of petitioner's motion to recall the mandate violates the Due Process Clause of the Fourteenth Amendment.⁸

⁸ The Missouri Supreme Court's summary denial of Mr. Taylor's motion to recall his mandate also violates the Eighth Amendment's prohibition against the "arbitrary and capricious infliction of the death penalty." *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980), as applied to the states via the Fourteenth Amendment.

CONCLUSION

Based on the foregoing, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

1a

SUPREME COURT OF MISSOURI
EN BANC

June 29, 1993

No. 74220
Circuit Court No. CR89-4934

STATE OF MISSOURI,

Respondent,

—vs.—

MICHAEL TAYLOR,

Appellant.

O R D E R

Judgment vacated. Cause remanded for new penalty hearing, imposition of sentence, and entry of new judgment.

Day - to - Day

/s/ EDWARD D. ROBERTSON, JR.
Edward D. Robertson, Jr.
Chief Justice

STATE OF MISSOURI—SCT.:

I, THOMAS F. SIMON, Clerk of the Supreme Court of Missouri, do hereby certify that the foregoing is a true copy of the order of said court, entered on the 29th day of June 1993, as fully as the same appears of record in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court. Done at office in the City of Jefferson, State aforesaid, this 29th day of June, 1993.

/s/ Thomas F. Simon Clerk

/s/ Mary Elizabeth McHaney, D.C.

3a

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

WD 46540
CIR. CT. CV91-20562

MICHAEL TAYLOR AND RODERICK NUNLEY,
Appellants,

—VS.—
(JACKSON)

STATE OF MISSOURI,
Respondent.

O R D E R

NOW ON THIS DAY the Court, being fully advised in the premises, orders that the appeal in the above-styled case be and is hereby transferred to the Supreme Court pursuant to the order entered by the Supreme Court of Missouri on June 16, 1988, because the underlying convictions resulted in imposition of the death penalty.

Dated this 22 day of July, 1992.

/s/ HAROLD L. LOWENSTEIN
HAROLD L. LOWENSTEIN, CHIEF JUDGE

4a

cc: Clerk, Jackson County Circuit Court
John Wray Kurtz
John Munson Morris

CERTIFIED COPY

I certify that the foregoing document is a full, true and complete copy of the original on file in my office and of which I am legal custodian.

Austin E. Van Buskirk
Court Administrator

Circuit Court of Jackson County, Missouri

10/6/92
Date

By [ILLEGIBLE]
Deputy

5a

MISSOURI COURT OF APPEALS
WESTERN DISTRICT

WD 49270

STATE OF MISSOURI ex rel.,
MICHAEL TAYLOR,

Relator,

—VS.—

THE HONORABLE H. MICHAEL COBURN
Circuit Judge, Division 9
Sixteenth Judicial Circuit,

Respondent.

ORDER DENYING PETITION FOR
WRIT OF PROHIBITION

Now on this 8th day of April, 1994, the court having considered relator's petition for writ of prohibition and being fully advised, permission to proceed in forma pauperis is granted, the motion to consolidate applications for writ of prohibitions for defendant Roderick Nunley, WD 49235, and relator

6a

herein, is denied, and the petition for writ of prohibition is denied.

/s/ ROBERT G. ULRICH

Robert G. Ulrich, Presiding Judge
Writ Division

Fenner, J., concurs

7a

IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI
AT KANSAS CITY

Case No. CR89-4934
Division 9

STATE OF MISSOURI,

Plaintiff,

—VS.—

MICHAEL TAYLOR,

Defendant.

ORDER

IT IS HEREBY ORDERED that Defendant's Motion for Continuance, filed June 16, 1994, is OVERRULED.

IT IS FURTHER ORDERED that all motions not heretofore ruled are OVERRULED.

June 17, 1994

DATE

8a

/s/ H. MICHAEL COBURN
H. MICHAEL COBURN, JUDGE

I hereby certify that copies
of the foregoing were mailed
this 25 day of June 1994,
to the following:

Jeff Stigall, Prosecuting Attorney
James McMullen, Defendant's Attorney
C. J. Pleban, Defendant's Attorney
Criminal Data Entry
Criminal Section

Ruth Schulze, Clerk, Division 9

9a

IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI
AT KANSAS CITY

Case No. CR89-4934
Division 9

STATE OF MISSOURI

—VS.—

MICHAEL TAYLOR

ORDER

Defendant's Motion for Continuance of May 2, 1994 setting, filed April 4, 1994 is OVERRULED.

Defendant's Motion for Reconsideration of its Former Ruling Denying Defendant Right to Withdraw His Plea of Guilty and to Enter Plea of Not Guilty, filed March 29, 1994, is OVERRULED.

Counsel is advised that the trial setting of May 2, 1994 is firm and no continuances will be granted from this trial setting. All counsel should be prepared to try this case at this setting without further delay or excuses.

10a

April 8, 1994

DATE

/s/ H. MICHAEL COBURN
H. MICHAEL COBURN, JUDGE

I hereby certify that copies of the foregoing
were mailed this 8 day of April, 1994 to:

Jeff Stigall, Office of Prosecuting Attorney

James McMullin, Defendant's Attorney

C. John Pleban, Attorney

Defendant

Jackson County Jail

CR Data Entry

CR Section

R. Schulze, Division 9 Clerk

11a

In the
CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI
AT KANSAS CITY

No. CV91-20562
No. CV91-20638
Consolidated Cases

MICHAEL TAYLOR,

Movant-Defendant,

—v.—

STATE OF MISSOURI,

Respondent-Plaintiff.

—and—

RODERICK NUNLEY,

Movant-Defendant,

—v.—

STATE OF MISSOURI,

Respondent-Plaintiff.

MEMORANDUM, ORDER AND JUDGMENT

This is about the murder of Ann Harrison, and that must not be forgotten. It is also about the sometimes elusive ideal of due process of law. That much also must be distinctly understood. The law is, and always has been, both sword and shield. The shield should have protected Ann Harrison, but it did not. The sword should avenge her, but only if it is wielded in conformity to due process. If the murderers of¹ Ann Harrison go unpunished, sword and shield have failed us; if the murderers are not punished in accordance with law, if they are not protected against the exercise of ultimate power by the state, the shield likewise fails us, and the sword threatens us all. "I'd give the Devil benefit of law, for my own safety's sake."¹

This case is *not* about the reputation of the trial judge (Hon. Alvin C. Randall, Circuit Judge). Movants' counsel sought release from this case, rather than be forced to present evidence concerning the trial judge that they thought they had to present, but did not want to present or believe; but the trial judge himself appointed them to do what the law and their profession commanded, and in doing so he undoubtedly knew that these were men who would do their duty. This Court held them to strict performance of that duty, and they did so in the noblest tradition of the American bar. No one—not the movants, the judges of the Sixteenth Circuit, nor any member of the bar—can fault movants' counsel for their work in this case.

Valiantly indeed did the State's counsel strive to defend not only the merits of this case, but the rep-

¹ St. Thomas More, in R. Bolt, *A Man for All Seasons*.

utation of the trial judge. This Court's own sense of duty was sorely tried by the necessity of refusing to permit that kind of trial; but this Court could not do otherwise, consistent with the law, which binds the movants, their lawyers, the State, and judges alike.

Procedural History

This memorandum shall serve as the Court's findings of fact and conclusions of law, as required by Rule 24.035(i) Mo.R. Crim. P. Except where otherwise noted, all factual findings set forth herein should be deemed found beyond a reasonable doubt. All objections not expressly ruled upon shall be deemed overruled. To the extent specific findings on any factual issues are not made, they shall be deemed found in accordance with the result reached. Cf. Rule 73.01(a)(2), Mo.R.Civ.P.

In the summer of 1989, Michael Taylor and Roderick (Roger) Nunley, sometimes hereinafter referred to as movants, were charged, respectively, in 16th Cir. Nos. CR89-4934 (Taylor) and CR89-3323 (Nunley), with one count of murder in the first degree, one count of armed criminal action, one count of kidnapping, and one count of forcible rape. Informations in lieu of indictment subsequently charged movants with the same counts, adding allegations that they were prior and persistent offenders. Counsel were appointed for both movants, and pretrial proceedings ensued, including motions and discovery. In the process, extensive notices of aggravating circumstances were filed against each movant, evincing the State's intention to seek a death sentence. After several changes of judge at the behest

of the parties or upon recusals, both movants' cases were assigned to Judge Randall late in 1990.

On January 28, 1991, Nunley, appearing in person and by counsel, entered a plea of guilty to all charges before the trial judge. There was no plea bargain, and, following an extensive examination of Nunley by the court and counsel, the pleas were accepted, and a sentencing hearing was set.

Similarly, on February 8, 1991, Taylor, also appearing in person and by counsel, entered a plea of guilty to all charges, without a plea bargain. Following extensive examination of Taylor by the court and counsel, the trial court accepted the pleas and a separate sentencing hearing was set.

During the period March 18 through March 21, 1991, and April 23 through April 25, 1991, the trial court held separate hearings on what most often is described as "penalty phase" evidence regarding Nunley and Taylor; that is, the State presented evidence on the issue of aggravating circumstances and the propriety of the death sentence, and Nunley and Taylor presented evidence of mitigating circumstances and the impropriety of the death sentence. Although certain testimony on behalf of the State from the Nunley hearing was admitted in the Taylor hearing by stipulation, each hearing was distinct, and the trial court rejected the State's effort to introduce Taylor's videotaped police confession into evidence against Nunley. Trial Tr. 271-74.² At the conclusion of each penalty hearing, sentencing was deferred.

² References to "Trial Tr." are to the transcript of the guilty plea and penalty phase proceedings in the underlying criminal cases. References to the "PCR Tr." are to the transcript of the hearing on the motions for postconviction relief.

On May 3, 1991, Nunley and Taylor came before the trial judge for sentencing. In separate hearings, allocution was granted, the trial judge orally recited findings concerning aggravating and mitigating circumstances, and sentenced each movant to death on the murder charge, with consecutive sentences of 10 years for armed criminal action, 15 years for kidnapping, and life for rape. Neither movant was specifically found to be a prior or persistent offender, or sentenced as such on those counts where it was germane.

Following pronouncement of sentence, the trial court informed each movant of his right to proceed under Rule 24.035, Mo.R.Crim.P., and attempted to inquire concerning assistance of counsel. Nunley declined to make any response; Taylor indicated that his only complaint lay in the manner in which he was shuffled from one counsel to another. No probable cause was found to believe that either movant had received ineffective assistance of counsel. Consequently, movants were committed to the custody of the Missouri Department of Corrections, death warrants were signed, and a trial judge's statutory report was filed.

Notices of appeal to the Supreme Court of Missouri were thereafter filed by counsel for each movant. Those appeals are pending.

On August 9, 1991, Taylor filed a verified, timely motion³ for postconviction relief under Rule 24.035.

³ The record does not seem to reflect the date on which either movant was actually delivered to the Missouri Department of Corrections. In the absence of any indication to the contrary, the Court has inferred that each motion for relief in this case was filed within 90 days after movant's delivery to the Department. The Court also notes that Taylor's motion is not the

16th Cir. No. CV91-020562. On August 12, 1991, Nunley also filed a verified, timely motion for relief. 16th Cir. No. CV91-020638. The postconviction cases were assigned to Judge Randall, who granted movants' requests to proceed as indigents, and appointed John Turner to represent Taylor and John Kurtz to represent Nunley. On August 22, 1991, another attorney, apparently retained by the Missouri Public Defender, entered an appearance for Mr. Taylor. That appearance was stricken by Judge Randall by order and memorandum of August 28, 1991, noting Taylor's allegations of conflict of interest within the Public Defender System. On September 3, 1991, Judge Randall recused himself in each postconviction case. Timely, verified amended motions for relief and requests for evidentiary hearing were filed by appointed counsel as each case wended its way from judge to judge in the Sixteenth Circuit. The State filed motions to dismiss without an evidentiary hearing. Following various reassignments and recusals, the circuit's acting presiding judge informed the Chief Justice of Missouri that all judges of the circuit were recused. Accordingly, the undersigned was designated as special judge in each case by order of the Supreme Court filed on November 22, 1991.

On November 26, 1991, this Court entered its order consolidating both postconviction cases for hearing, and fixing the hearing for January 6, 1992, within the 60 day period required by Rule 24.035 (g). All parties moved for a continuance, and the State filed a motion to preclude deposition of the prose-

typical *pro se* pleading, but bears indicia of a professional hand; Nunley's motion, though much cruder in form, was apparently filed after he had consulted with counsel. See PCR Tr. 595.

cutors. By order of December 11, 1991, this Court stayed deposition of the prosecutors and the trial judge, denied the continuance, but indicated that the scope of the hearing would be tailored to meet the needs of the parties in preparation.

On January 6, 1992, this Court was unable to travel to Kansas City for the opening of the hearing as scheduled. By consent of all parties, and since presence of the movants was not essential, Rule 24.035(h), the hearing commenced on the record via conference call. The complete record of each of the underlying criminal cases was judicially noticed and received in evidence. The parties addressed various pending discovery disputes and motions, including a projected motion by movants to disqualify the Jackson County Prosecutor's entire office. The hearing was then continued for resumption at a later date. By memorandum and order of January 24, 1992, this Court, on its own motion, precluded a deposition of the trial judge except with his consent, entered protective orders regarding other discovery matters, denied the motion to disqualify the prosecutors, and fixed the resumption of the hearing for March 23, 1992.

On February 14, 1992, the State's principal attorney on these cases, Patrick Hall, unexpectedly died, causing some delay and confusion in the discovery process. The Court was unaware of Mr. Hall's death until several weeks later, by which time additional motions for protective orders directed at movants' discovery requests had been filed. The Court addressed these on March 11, 1992, requiring the State to provide data concerning plea negotiations in murder cases and expanding the permissible scope of depositions of members of the Jackson

County Prosecutor's office. The State sought a writ of prohibition, which was denied by the Missouri Court of Appeals, Western District.

The consolidated hearing on the motions for post-conviction relief resumed on March 23, 1992, with a seemingly interminable chambers conference. Movants' counsel sought a continuance, due to the State's delay in providing discovery. This request was denied, but the Court indicated that the record would be held open to permit development of further evidence or proffers of evidence on the claim of racial discrimination. Movants' counsel then sought leave to withdraw, on the basis that the allegations concerning the trial judge and the process of attempting to prove them would damage the interests of counsel and their other clients, insofar as cases pending in the Sixteenth Circuit were concerned. Leave to withdraw was denied, as were concomitant motions by Taylor and Nunley to discharge appointed counsel. Evidence was then adduced, from March 23 to March 26, 1992. The record was held open to permit movants to adduce additional evidence on the issue of racial discrimination.

On May 1, 1992, movants filed a brief and an appendix of documents pertaining to the claim of racial discrimination in the handling of their cases. The State has filed objections to exhibits in the appendix which had not been offered previously. On June 1, 1992, the parties filed their briefs, and the State filed a motion to reopen the record, together with certain affidavits. The Court denied the motion to reopen by order of June 3, and the motions for postconviction relief were taken as submitted as of June 1, 1992. This memorandum, order and judg-

ment is filed within 30 days of that date, as prescribed by Rule 24.035(i).

Facts of Underlying Cases

On March 22, 1989, Ann Harrison left her Kansas City home to catch the school bus. A few minutes later, her mother heard the school bus horn. She looked out and saw the bus, and saw Ann's books, jacket, and other items near the mailbox by the road, scarcely 50 feet from the front door of her home; but no Ann. Her mother motioned the school bus on and started to search. She looked in the house, and in the yard, and in the vicinity of the house. No Ann. The police were called, the search intensified, spreading over much of the area of Kansas City where Ann's home was located. No Ann. Hours passed; night fell; and still, no Ann.

The next evening, Kansas City police responded to a report of a suspicious car, and came upon a stolen 1984 Monte Carlo SS automobile parked on a street in Grandview, a Kansas City suburb, not many miles away from Ann Harrison's home. The owner of the car was notified of its location, and came to inspect it, together with her boyfriend at the time. In the process, the boyfriend decided to open the trunk. He had found Ann.

Ann Harrison died from multiple stab wounds, some of which penetrated her heart, causing her to bleed to death. All of the wounds had been inflicted before death, and she undoubtedly had been conscious during their infliction and for several minutes thereafter. Before death, Ann had been subjected to sexual intercourse, and her genitals showed signs of

injury and bleeding. When found, Ann's wrists, were bound.

The police impounded the car in which Ann had been found, and carefully examined both it and her body for evidence. Sweepings were taken from the interior of the car and the trunk. Samples of hair were taken from Ann, together with swabs from her genitals. Her clothing was preserved, and tested for the presence of hair and seminal fluid, which were found. In addition, some other substance, thought to be a lubricant, was identified.

For three months, the police sought the perpetrators of Ann Harrison's murder. Rewards were offered. Publicity in the Kansas City area was intense (as reflected in newspaper clippings filed in support of a pretrial motion). Finally, one Kareem Hurley, a convicted felon, made an anonymous call to a special telephone known as the "TIPS hotline," with information about Ann's death. Eventually, Hurley was persuaded to identify himself and come forward. He advised the police that someone known to him as Roger Nunley had admitted involvement in raping and killing Ann Harrison. Nunley had also implicated a friend of his, Michael Taylor.

As luck would have it, Michael Taylor was imprisoned at the time Hurley came forward. He had been paroled on a previous sentence for stealing, had broken parole, and, only a couple of days after the death of Ann Harrison, had been apprehended. Kansas City police officers proceeded to interview Taylor in prison at Cameron, Missouri. He was advised of his rights and agreed to an interview. At first, he insisted that only Nunley was the guilty party. When told of Hurley's statements, he asked to speak to a relative on the telephone. After doing so,

he indicated to police his willingness to give a statement. Trial Tr. 689. He gave a videotaped statement, admitting complicity in the abduction, rape and murder of Ann Harrison, specifically admitting raping and stabbing Ann Harrison, but contending that the leading role in the affair belonged to Nunley. When the interrogating officers discovered that the gods of technology had betrayed them, and the videotape failed to record any sound, Taylor readily agreed to repeat his statement and did so. Trial Ex. 108, 109; Trial Tr. 695ff. He also agreed to the taking of pubic and head hair specimens and blood samples.

Police commenced a search for Nunley, about whom they already had developed suspicions, due to his history of automobile theft activity in the Grandview area. Indeed, a day or two before Taylor confessed, Nunley had been arrested when police executed a search warrant at his mother's home (the scene of the crime), but he had refused to be interrogated and was released after 20 hours elapsed without a warrant issuing. Trial Tr. 276, 701, 702. It appears that Nunley succeeded in evading the police for some time, but he was finally spotted near Troost Lake in Kansas City and captured after a brief pursuit by several officers. After his arrest, Nunley was likewise interrogated by Kansas City police officers. He was advised of his rights, and, after learning of Taylor's confession, asked to see it. Upon viewing the Taylor videotape, he told the interviewing officers of his disagreement with Taylor, and agreed to give his own videotaped confession, signing a written waiver of *Miranda* rights. Nunley's confession was virtually a mirror image of Taylor's, with Nunley maintaining that Taylor had played the leading role in abducting, raping and killing Ann

Harrison, but admitting that he, Nunley, had assisted Taylor's rape by fetching hair grease to use as a lubricant. He likewise admitted that he had agreed to the plan to kill the girl and had obtained the knives for that purpose; he also admitted at least attempting to stab Ann. Trial Tr. 279ff.; Trial Ex. 110, 112, 113.

As noted, police previously had obtained and executed a search warrant at the home of Nunley's mother. From the basement they recovered sweepings which later produced hair of Ann Harrison's type. Analysis of the hair and fluid samples obtained from Ann Harrison's body, the car in which she was found, and from Nunley and Taylor yielded results consistent with Nunley's statement that Taylor was the only one actually to have intercourse with the girl. DNA analysis also indicated Taylor as the person who left seminal fluid in or on Ann. See PCR Tr. 292. The pathologist who performed the autopsy on Ann Harrison disclosed that the majority of wounds, including the most serious, had been inflicted with a short-bladed knife, which both Nunley and Taylor agreed had been used by Taylor, with Nunley wielding a larger, butcher-type knife. Trial Tr. 17 (Nunley plea); Trial Tr. 632 (Taylor plea).

Nunley and Taylor were buddies. Slightly older than Taylor, Nunley was a child of the streets, with no stable home. He turned to drugs and thievery at an early age. He prided himself on his driving skill and his ability to steal cars. Taylor, on the other hand, came from a solid, middle-class family. His parents were hard-working people, and they governed a seemingly stable, loving family. Nevertheless, in his teens, Taylor took to consorting with low company, including Nunley. Following Nunley's

example, Taylor took to drugs and theft. His family watched sorrowfully but helplessly as Taylor degenerated. In time, both Nunley and Taylor came to the attention of the authorities. Nunley acquired multiple misdemeanor and felony convictions for stealing and tampering with automobiles, and served some time. Likewise, Taylor was convicted of felony stealing, burglary, and tampering. He, too, went through the probation mill, failed, and was finally sentenced to a prison term. He was paroled in 1988, assigned to a halfway house, and disappeared, to renew his friendship with Nunley.

While Ann Harrison slept at her home for the last time, Nunley and Taylor were about their favorite pasttimes: taking cocaine and stealing cars, or car parts. Earlier, they had stolen the Monte Carlo, and on the night of March 21-22 were in search of "T-tops" to steal and sell to obtain more drugs. They were smoking "primos," a potent mixture of marijuana and cocaine. Nunley, at least, had been on a binge for nearly four days. In the small hours of March 22, their driving drew the attention of a police officer in Lee's Summit, another Kansas City suburb. The officer pursued them, but, alas for Ann Harrison, they eluded him. Gradually, inexorably, their meandering course brought them, at approximately 7:00 a.m. on March 22, to Ann Harrison's door. They observed her waiting for the school bus and they stopped. One of them⁴ got out of the car,

⁴ The Court has reviewed the entire record of both underlying criminal cases, but the Court has refrained from considering evidence presented as to Nunley alone in making findings concerning Taylor, and vice versa. Thus, the Court's findings as set forth in the narrative and elsewhere in this memorandum are found as to each defendant solely on the evidence of record

engaged Ann in conversation briefly, seized her, dragged her into the car, and they sped off. It is agreed that the immediate objective was to steal her purse.

Taylor and Nunley proceeded to the home of Nunley's mother, about a 10 or 15 minute drive. Apparently they believed that no one would observe their activities with Ann if they went to the basement, and they did so, first blindfolding Ann and then forcing her to crawl into the house so as to conceal her from view. Once in the basement, which was largely a finished room with carpeting on the floor, Ann was forced to disrobe, and she was subjected to intercourse, during which one friend called the other by name. Following that episode, Ann was allowed to dress herself. She then begged Nunley and Taylor to accept ransom and not harm her, and they pretended to be affected by this. She was escorted back to the Monte Carlo, which was parked in the garage. Taylor and Nunley bound her and placed her in the trunk of the car; they then discussed her fate. They agreed that she had to be killed to prevent her from identifying them.

Nunley went to the kitchen of his mother's house and obtained two knives, one large and one small. He came back and gave the smaller one to Taylor. In spite of misgivings, each of them commenced stabbing Ann as she lay bound in the trunk. After inflicting the fatal wounds, they watched Ann's life ebb away, closed the trunk [ILLEGIBLE], got in the car and drove a few blocks away. The car was abandoned. At some point, the knives were returned to

(including the guilty plea colloquy and videotaped confession) pertaining specifically to that defendant. Nevertheless, the evidence is congruent on many points in each case.

the kitchen whence they came, and the blindfold and some buttons or other items were collected and placed in a bag. Subsequently, this bag was thrown in a sewer in the vicinity of the crime scene.

During the crime, both Taylor and Nunley were under the influence of cocaine, describing themselves as "high." Both were examined by qualified psychiatrists or psychologists during pretrial proceedings, including examinations by experts employed by the Missouri Department of Mental Health, as well as experts retained by the defense. Both are of average or "low average" intelligence, with some high school education. Neither was found to be suffering from a mental disease or defect excluding responsibility, nor was there any indication that they lacked the capacity to understand the proceedings against them or assist in their defense. Both were found to be suffering consequences of their drug dependency.

Nunley's history showed that the use of cocaine produced significant character or behavior changes, but the defense's own experts concluded that his cocaine intoxication would not qualify as insanity at the time of the offenses. Taylor's psychological profile indicated a tendency to be dominated or easily led, but disclosed nothing beyond cocaine intoxication at the time of the offenses, either. See Def. Ex. 1-3 (introduced at the Nunley plea); report of Fleming Associates, 2/5/91 (Taylor); Trial Tr. 880-82.

Facts Relating to Postconviction Claims: Nunley

Formal proceedings against Nunley commenced after his arrest in June, 1989. An indictment was handed up in July, and Barbara Schenkenberg and

JoAnn Arnold were assigned as counsel for him. Schenkenberg (now Barbara Oyebenji) had graduated from law school in 1975, and had represented the Dallas City Police Department and done some public defender work before joining the Missouri Public Defender's Capital Litigation Office in Kansas City in 1989. Schenkenberg was hired to head that office, and she in turn hired Arnold, who had been admitted to the bar in 1987 and had worked for two years in the appellate and trial divisions of the Public Defender System in Kansas City. She had handled some two dozen felony cases, but had not tried any. Nunley was one of the first cases assigned to the Kansas City Capital Litigation Office.

Schenkenberg and Arnold met promptly with Nunley, discussed the case fully, and were advised by him from the outset that he was guilty, and wished to plead guilty in exchange for a sentence of life imprisonment without parole. Nevertheless, Nunley's counsel filed plethoric pretrial motions (this Court counts 34, including constitutional attacks on Missouri's death penalty statute, a motion for change of venue, a motion attacking procedures for summoning venires in Jackson County, and many others) and engaged in extensive discovery, which disclosed the full extent of the State's case, including the confession, the admissions to Hurley, and the physical evidence. In addition to the initial examination conducted under Ch. 552, RSMo. 1986, forensic psychiatrists and psychologists were retained on Nunley's behalf, and he was subjected to extensive testing, with the conclusion delineated above, that no viable mental disease or defect defense existed, and with the further conclusion that any claim of diminished capacity would depend wholly on Nun-

ley's cocaine usage. At no time was there any suggestion that Nunley was not mentally competent to proceed.

Faced with the gruesome circumstances of the crimes against Ann Harrison, Schenkenberg and Arnold concluded in the fall of 1990, as trial pressure was building with the docketing of the case on a special docket, that Nunley should plead guilty. At that time, as well as at other times during the representation, Nunley's counsel discussed his options with him. He was advised of only two: plenary trial by jury, or a plea. There was no consideration by counsel or discussion concerning the possibility of seeking the State's consent to a plea, with sentencing by a jury, as permitted by §565.006.2, RSMo. 1986, nor was there any consideration or discussion of confessing guilt to a jury at trial and seeking mercy from the jury. At the time, however, the prosecutors had given no indication whatsoever that the State would agree to anything which might benefit defendant, and there was no reported capital case anywhere in Missouri in which the procedure provided in §565.006.2 had ever been utilized. Moreover, the strength of the State's case and the power of the aggravating circumstances were such that counsel had no reason actively to consider putting the case before a jury in any way. The focus of counsel was how best to enter a plea of guilty and at the same time avoid the death sentence. It was decided that a plea would have to be entered without a plea bargain (in lawyer's parlance, this is pleading "open," i.e., without a binding recommendation from the State). Nunley agreed.

In November, 1990, the case was before Judge Mason, as chief criminal judge for the circuit. At a

tentative trial date in November, the parties appeared before Judge Mason, and Nunley's counsel announced his desire to plead guilty, without a plea bargain. By this time, both parties had exercised their automatic change of judge option under Rule 32.07(a). Judge Mason advised the parties that he could not under any circumstances impose the death sentence. The State, which was chagrined at the idea of a plea, requested that he recuse himself, and he did so. By lot, the case was assigned to Judge Randall.

Following assignment of the case to the Judge Randall, Nunley's counsel canvassed the judge's probable attitude toward a sentence of death. Counsel were already aware of his general reputation, which, in summary, indicated that he was capable, conscientious, fair, lenient, genial, but unconventional and idiosyncratic, in that on some afternoons he seemed testy and inattentive, due, the wags had it, to luncheon libations.⁵ After thoroughly reviewing the courthouse reputation of Judge Randall, and conferring with Nunley about it, Schenkenberg and

⁵ A major controversy at the hearing before this Court was the admissibility of evidence concerning the trial judge's personal habits and reputation for temperance, or intemperance, as the case may be. This Court held that such evidence was inadmissible as proof of the claim that the trial judge had consumed alcohol or was intoxicated during any of the proceedings in the underlying criminal cases. However, the Court felt obliged to permit testimony from trial counsel for Nunley and Taylor as to what they believed the trial judge's reputation to be, on the theory that this might be relevant to issues of claimed ineffective assistance of counsel. Thus, the Court does not intend to find as a fact the trial judge had the reputation indicated, but limits itself to findings as to what defense counsel reasonably knew or believed during the previous proceedings.

Arnold concluded that here was a judge least likely to be swayed by the emotional aspects of the murder of Ann Harrison, and most likely to display compassion in sentencing. They did not expect or believe, and in fact had no reason to expect or believe, that the trial judge's alleged occasional imbibing would in fact affect his decisionmaking in any way. All things considered, defense counsel advised, and Nunley agreed, that he should plead guilty before Judge Randall. This decision having been settled upon, Schenkenberg's primary attention was diverted to another capital case in a different jurisdiction, leaving Arnold to prepare the case for mitigation.

Thus it was that on January 28, 1991, Nunley pleaded guilty to all charges. Nunley was examined first by his own counsel, then by counsel for the State, with additional examination by counsel for both sides and by the Court itself. Trial Tr. 2-55.

The plea colloquy disclosed that Nunley was born on March 10, 1965 and had completed the eleventh grade; he was not then taking any drugs or medication, nor had he ever been treated for a mental disease. He understood each of the four counts against him, including the essential elements of each, as well as the range of punishment for each. He understood all of the constitutional rights he was foregoing by pleading guilty, including the right to counsel, the right to confront witnesses, the right to compulsory process, the presumption of innocence, the right to remain silent, and the right to appeal. He acknowledged that he had been provided with all police reports concerning the incident as well as the opportunity to view his videotaped confession. He expressed complete satisfaction with his trial coun-

sel, Schenkenberg and Arnold (both of whom were present).

Nunley was also examined at length about his understanding concerning trial by jury, including the bifurcated trial procedure employed in capital sentencing. Portions of this colloquy are set forth in Exhibit A to this memorandum, and incorporated herein by reference. Nunley indicated his full understanding of the role of the jury in both the guilt and sentencing phases of a trial, and also indicated that he understood the sentencing procedures that would follow from not going to a jury trial. He expressed his waiver of his right to trial by jury on both guilt and sentence with unmistakable clarity.

The version of events given by Nunley at his plea does not differ materially from the version he gave to Kareem Hurley or to the police. At the plea, Nunley acknowledged his confession as voluntary and lawfully obtained. Nunley also indicated his awareness that, according to psychiatric (Dr. Logan) and psychological (Dr. Lipson) evaluations, even if he was suffering from diminished capacity, it did not prevent his appreciating the nature, quality, and wrongfulness of his actions. Nunley testified to his own belief, and his awareness of expert opinion, that he was competent to proceed in his defense.

At the conclusion of the examination, the trial judge found that Nunley had entered his plea knowingly and voluntarily, with a full understanding of his rights and the understanding of the effect of his plea on those rights. A factual basis for the plea was also found, and Nunley was thereupon found guilty of all four offenses beyond a reasonable doubt. A sentencing hearing was set for March 18, 1991.

Prior to the sentencing hearing, Arnold expressed misgivings to Schenkenberg about her ability to carry on as lead counsel. Schenkenberg replied that she had no choice. Both counsel also learned that codefendant Taylor's case had been assigned to the same trial judge, for the same purpose: plea, followed by sentencing hearing. Although Schenkenberg and Arnold asserted at the postconviction hearing that they had misgivings about the same judge having both cases, in view of the differing claims by each defendant concerning the role he played in the crimes, they decided to do nothing, since they were convinced that the only realistic chance of evading the death sentence lay with Judge Randall.

Despite her misgivings, Arnold, assisted by another attorney, Randall Schlegel, prepared a thorough presentation for the sentencing hearing. Prior to the hearing, several motions were filed to limit the State's case. One motion, to exclude evidence pertaining to Nunley's alleged role in an uncharged homicide, was granted. At the hearing, the State introduced evidence fully describing the commission of the crimes, including the details described *ante*, pp. 8-15. The State's evidence amply established that Ann Harrison had been killed in the course of perpetration of kidnapping, rape and robbery, that she had been bound and rendered helpless before she was killed, that her killing was intended to prevent her being a witness against Nunley and Taylor, that Nunley had multiple prior convictions, and that Nunley had actively participated, in the killing of Ann Harrison, evidencing an intent to kill her. The State's effort to introduce the Taylor confession as part of the case against Nunley was

thwarted by objection from defense counsel, which was sustained by the trial judge. At appropriate points, State's witnesses were vigorously cross-examined. In particular, Kareem Hurley was impeached with his recantation of a prior guilty plea and his claim for reward money. In addition, defense counsel obtained from Hurley valuable testimony concerning Nunley's bizarre behavior when under the influence of cocaine.

Nunley's counsel presented a substantial case in mitigation. Psychological experts were called to testify concerning Nunley's mental condition, particularly his condition during and as a result of the use of cocaine. Family members were called to testify concerning Nunley's unpleasant, beleaguered childhood. Nunley's remorse for the crimes and willingness to take responsibility for them by pleading guilty was emphasized.

There is no credible evidence that the trial judge consumed alcohol, was under the influence, or was intoxicated in any manner or to any degree during the plea proceedings and the sentencing hearings with regard to Nunley. This Court rejects as not credible the testimony of Arnold that she detected an odor of alcohol from the trial judge during proceedings on March 21 and 22, 1991.

At all times during the proceedings in the underlying criminal cases, Nunley desired to plead guilty. At no time did he wish to go before a jury for any purpose, much less for sentencing. He concurred completely in his counsel's advice that he plead guilty and seek to persuade a judge to sentence him to life without parole. The Court rejects as completely incredible Nunley's postconviction testimony that, if advised concerning the mechanism for jury

sentencing under § 565.006.2, he would not have pleaded guilty and would have insisted on going to trial unless he could have otherwise secured jury sentencing. Indeed, at the time of his plea, he was convinced, with reason, that a jury would inevitably recommend a death sentence in his case, and he remains convinced that that would be the outcome now, if a jury trial were granted.⁶ This Court concurs in Nunley's own judgment about the well-nigh ineluctable outcome of a jury trial, both in 1991 and now: he would be convicted and sentenced to death.

⁶ Nunley testified at the postconviction hearing:

Q. Okay. Now, did you talk about the facts of the case and how those would be viewed by a jury versus how they would be viewed by a Judge?

A. Yes.

Q. And so the very fact that a fifteen-year-old girl was kidnapped while waiting for her bus, raped, murdered, the city-wide manhunt that went on, all of that evidence, Kareem Hurley's statement against you, all of that was stuff that you talked about, is that right?

A. Yes, sir.

Q. And after talking about that you were certain in your own mind that a jury would sentence you to death?

A. Yes. [PCR Tr. 588-89.]

* * *

Q. The point is there is no doubt in your mind as you sit here today that if this evidence was viewed by a jury that it would outrage the jury?

A. Yes.

Q. And as you sit here today, the facts are the same and the likelihood, the probability in your own mind is that a jury's going to sentence you to death?

A. Yes, sir. (PCR Tr. 594-95.)

Facts Relating to Postconviction Claims: Taylor

Following his confession in June, 1989, at the Cameron prison, Taylor was charged with the same four counts as Nunley. Unfortunately, his representation was confused for several months, with one lawyer after another entering and withdrawing. At one point, Kent Gipson, of whom more anon, was representing Taylor. He conferred with him concerning the strength of the State's case and advised an effort to organize a quick plea of guilty to murder in the first degree in exchange for a sentence of life without parole. Taylor, although admitting guilt, was not receptive to Gipson's recommendation, and did not like Gipson. PCR Tr. 611-12. That did not matter much, because he soon was given Patrick Berrigan, whom he did like. Berrigan filed multiple motions and discovery requests, and evidently began to prepare to gather mitigating evidence, but then he transferred to the Capital Litigation Office in Kansas City, which was already representing Nunley. Hence, Taylor's case was transferred once more, this time to attorneys in the Capital Litigation Office in Columbia.

Under the organization of the Missouri Public Defender System adopted in 1989 (and continuing to the present), capital cases are handled by one of three special offices intended exclusively for such cases. One office is in St. Louis, another in Kansas City, and a third in Columbia. The offices function independently of each other, and, when a conflict of interest arises, i.e., when codefendants are charged with the same murder for which the death penalty will be sought, a different office will represent each defendant. All of the offices were and are under the

general supervision of one individual, Kevin Curran, but there is no evidence that the attorneys in any office can or do disclose information about their cases to Curran in such a way that he uses it to make decisions potentially inimical to a codefendant's interests. There is a single budget for expenses, including expert witnesses, of the capital litigation offices, but, so far as the record discloses, these funds were and are assigned on a first-come, first-served basis, with each attorney being entitled to "reserve" funds for the needs of his particular case with no limitation other than the attorney's judgment and, of course, the aggregate amount of the appropriation itself.

Martin McClain and Leslie Delk were assigned to represent Taylor after his case reached the Columbia office. McClain was a lawyer with substantial experience in death penalty litigation, in Wyoming and Florida. In May, 1990, he was hired by Kevin Curran to be a lead trial attorney in the Columbia office. He actually went to work in Columbia in July, 1990. He first learned of the Taylor case in September, when he was instructed to assume the representation from Berrigan. He also discovered that Judge Mason had docketed all pending capital cases in the Sixteenth Circuit for scheduling conferences on September 28. He did not attend the conference, asking Kansas City attorneys to cover for him while he went to Florida for cases he had retained there. He subsequently learned that Taylor's case was set for trial on February 17, 1991.

By September, 1990, Leslie Delk had been assigned as, cocounsel for Taylor. Delk, like McClain, started practice in Wyoming, and then worked full time in Florida on death penalty postconviction cases from

1988 to 1990. In April, 1990, she joined the Columbia Capital Litigation Office to work on postconviction matters. Shortly thereafter, she transferred to the trial division to work under McClain.

Taylor's file was obtained, and Delk first met with Taylor in October or November, and reviewed his confession. Around Thanksgiving, McClain met with Taylor, and likewise reviewed his confession and the strength of the State's case generally with him. The combination of the videotaped confession and forensic evidence, including by this time DNA analysis which supported the Nunley version that only Taylor had in fact had intercourse with Ann, presented one of the strongest cases McClain had ever encountered. See PCR Tr. 123-24.

McClain and Delk decided to concentrate on possible penalty phase evidence, and decided that they needed mental health, social work and drug experts to present the issues of Taylor's drug addiction and relationship with Nunley to the best possible effect. McClain advised Curran that he would need to reserve funds for experts in Taylor's case out of the funds budgeted by the Public Defender System for that purpose (known as "E-funds"). He was told that all funds were obligated, and Taylor's case would have to go on a waiting list. Not content with this situation, McClain prevailed upon Patricia Fleming, a clinical psychologist with substantial experience as an expert witness in death penalty cases, to examine Taylor while she was in Kansas City to examine another defendant, Tina Wedlow, who was also McClain's client, charged with first degree murder. Fleming conducted the examination and provided a report. This report was in addition to psychiatric examinations of Taylor by the Missouri

Department of Mental Health, which had discovered no mental disease or defect.

As trial preparation proceeded, McClain was offered and accepted a new job in Florida, in connection with postconviction litigation. He planned to leave Missouri in early February. However, the possibility of a plea by Taylor had been discussed and all but decided. The bulk of preparation was then left to Delk, who, it had been previously agreed, would focus on penalty phase matters anyway.

In Taylor's case, as in Nunley's, both the State and the defense had exercised change of judge options. By early 1991, Taylor's case was before Judge Meyers, set for February 1. On that date, Taylor and his counsel conferred, and Taylor agreed to the recommendation that he plead guilty. At that time and before, counsel fully explored two options with Taylor: trial by jury, or plea. Since, as with Nunley, there had been no plea bargaining, it was clear that any plea would be "open." Taylor understood and agreed that the facts of his case impelled adoption of the strategy of pleading guilty, with sentencing by a judge, rather than trial by jury. The possibility of securing the State's consent to a sentencing jury after a plea, as provided in §565.006.2, was never discussed; nor was the possible expedient of admitting guilt to a jury and seeking mercy at the penalty phase of a trial. Here, too, however, counsel had concentrated on the best strategy to avoid a death sentence: a jury was viewed as almost certain to recommend death in light of all the facts of the case. Taylor was aware of and understood counsel's thinking, and agreed.

On February 1, 1991, Taylor and his counsel appeared before Judge Meyers and announced his

intention to plead guilty, to the surprise and consternation of the State, albeit Nunley had already pleaded. In light of the State's vigorous objections, which sprang in part from the State's chagrin that the case would not go to a jury, Judge Meyers hesitated, questioning Taylor's right to plead. In the course of discussion with the parties, he suggested the possibility that the case could be assigned to Judge Randall, inasmuch as he already had taken Nunley's plea. McClain conferred with Judge Randall and secured his assent to the transfer of the case, which accordingly was accomplished, and the plea set for February 8, 1991.

Although McClain and Delk were not intimately acquainted with the bench in Kansas City, they had naturally made inquiries concerning the sentencing proclivities of the judges prior to recommending that Taylor plead guilty. They learned that Judges Randall and Meyers were thought to be the best prospects for leniency in the Taylor case. There is no evidence that they learned of any reputation of Judge Randall regarding consumption of alcohol.⁷ All information in their possession led to the con-

⁷ The Court did not conclude that evidence of this sort might be admissible on the issue of ineffective assistance until JoAnn Arnold, one of Nunley's cocounsel, testified at the post-conviction hearing—after McClain and Delk had been excused. See PCR Tr. 432. Taylor's counsel asked leave to submit evidence that McClain and Delk were unaware of Judge Randall's reputation regarding use of alcohol and, if they had been so aware, they would not have advised a plea before Judge Randall. As far as this Court can determine, there has been no additional evidence proffered to that effect. It is abundantly clear, however, that all other criminal practitioners who claimed knowledge of such a supposed reputation did not treat it as a reason not to enter a plea in a capital case before Judge Randall.

clusion that Judge Randall would be a good judge for their purposes. The only misgiving was expressed by some Kansas City public defenders that having both defendants before the same judge might be inadvisable, particularly where Taylor's position was that he had acted under Nunley's direction and leadership. However, given the unanimous view that Judge Randall offered the best opportunity to avoid a death sentence, McClain concluded that the decision to plead before Judge Randall would stand.

On February 8, 1991, Taylor appeared in person and by counsel and entered his plea of guilty without a plea bargain. Trial Tr. 609-57. Like Nunley, he was thoroughly examined by counsel and by the court. He admitted raping and stabbing Ann Harrison, but maintained that the stabbing was done at Nunley's insistence. *Id.*, 632-33. The plea colloquy need not be reiterated at length here. Suffice it to say that Taylor was examined about and indicated a complete understanding of the elements of each offense, possible defenses, and each and every constitutional right. The right to trial by jury, and the role of the jury in sentencing was reviewed sedulously, and Taylor, waived each and every constitutional right knowingly and voluntarily, with full understanding of the plea and its consequences. The right to trial by jury, including sentencing by the jury, was waived with unmistakable clarity. That portion of the plea colloquy is attached hereto as Exhibit B, and incorporated herein by reference. The trial judge accepted the plea and set a sentencing hearing for April 1, 1991. This sequence was satisfactory to McClain, who preferred to proceed after Nunley's sentencing hearing had occurred.

Before the sentencing hearing, the vagaries of the Missouri Public Defender System dealt Taylor another blow: Leslie Delk, who had assumed principal responsibility for preparing the sentencing hearing, was dismissed from her employment. McClain had by this time assumed his responsibilities in Florida, and was keeping in touch mostly by telephone. Delk, with the assistance of a paralegal named Herring, had amassed a substantial file, but had still been unable to secure funds for a neuropharmacologist or a social worker.

Delk's dismissal, so far as the record here shows, was badly managed at best, and at worst displayed irresponsible indifference by the bureaucracy of the Public Defender System to the possible effects of her departure on her clients. However, McClain and Delk commendably rose to the occasion. A motion was filed on March 15 seeking a continuance of the April 1 sentencing hearing, retailing the vicissitudes of Delk's employment (and, in the process, laying the groundwork for the "conflict of interest" allegations of Taylor's postconviction motion). See PCR Movants' Ex. 1. After some discussion with McClain, the trial judge responded with an order continuing Delk's appointment as counsel for Taylor, and with assurances that funds under his control would be made available to pay both Delk and expenses of Taylor's defense, if necessary. The sentencing hearing was postponed to April 23, 1991.

Understandably, the dismissal of Delk disrupted preparations for Taylor's sentencing hearing. However, McClain, Delk and Herring all kept in touch with each other and with Taylor, and Taylor's file was in fact made available to Delk through McClain and Herring. The Court rejects any suggestion that

in fact Taylor's case was not properly prepared, or that preparation was left largely to the relatively inexperienced paralegal, Herring.

The record is clear that Berrigan, McClain, Delk and Herring, among them, had amassed a substantial mitigation file. Family members were located and prepared to testify. A qualified expert, Dr. Fleming, was endorsed as a witness and was prepared to testify concerning Taylor's psychological state. Doubtless there was some confusion and uncertainty, since Delk was faced with substantial pressure to find other permanent employment. Still, in fact, Taylor's sentencing evidence was prepared thoroughly and professionally. In this process, Taylor's counsel were aided by the fact that the bulk of the State's case against both defendants was necessarily presented in the Nunley hearing in March. McClain obtained a transcript of that hearing in anticipation of Taylor's hearing. No effort was made to take advantage of the trial judge's offer of funds for additional experts. There is no evidence that additional experts would have provided any evidence significantly different from or more helpful than that provided by Dr. Fleming.

Taylor's sentencing hearing began on April 23 and ended on April 25, 1991. The parties stipulated to the introduction in that hearing of the testimony of a number of the State's witnesses from the Nunley hearing, including the testimony of Hurley which reflected Nunley's version of events. The State presented evidence that, while awaiting trial for the crimes against Ann Harrison, Taylor had escaped from custody, but was apprehended speedily and without significant resistance. The State also showed that, before the Harrison incident, Taylor

had been on parole to a halfway house, but was terminated due to drug and alcohol usage. Assigned to another halfway house, he absconded in December, 1988, and was not apprehended until March 28, 1989, a few days after Ann Harrison died.

Although McClain and Delk testified at the post-conviction hearing that they were not really ready for Taylor's sentencing hearing, the record belies these assertions; furthermore, the Court infers from their testimony that they made a judgment that the crux of their case would be not so much their presentation as the trial judge's tendency to leniency. Nevertheless, a substantial and credible case was presented that Taylor was the victim of drug usage and the influence of Nunley. Family members recounted the sad deterioration of what had been a good, happy child as he grew to manhood and took to drugs and bad company. Dr. Fleming testified at length concerning the effects of Taylor's drug dependency, his personality, and the relationship with Nunley. The trial judge himself probed Dr. Fleming's opinion of the effect of Taylor's cocaine intoxication on his mental state at the time of the crimes against Ann Harrison. Taylor's depression and remorse for his conduct were emphasized throughout.

At the postconviction hearing, Taylor's testimony was a good deal less credible than was Nunley's. In particular, the Court rejects his belated contention that he was not capable of distinguishing between right and wrong at the time of the offense, due to his use of cocaine in "crack" form, and his assertion that he had no real discussion with trial counsel about his prospects of being sentenced to death by a jury. See PCR Tr. 616, 623; compare PCR Tr. 619-20. Nevertheless, it is clear even from Taylor's testi-

mony that his trial counsel had thoroughly reviewed his case with him, had discussed the pretrial motions which had been filed, and that he in fact instructed them concerning his desire to plead guilty. Like Nunley, Taylor plainly concurred with his counsel's judgment at the time that a jury trial should be avoided at all costs: his only hope lay with a plea to a trial judge who might be inclined to mercy.⁸

There is no credible evidence that, during the plea proceedings or sentencing hearing regarding Taylor, the trial judge consumed alcohol, was under its influence, or was in any way intoxicated. Indeed, neither McClain nor Delk ever observed any, behavior indicating any deficiency in the trial judge, other than he closed his eyes at times during the proceedings.

The Day of Sentencing

The trial judge set formal sentencing in both cases for May 3, 1991. The sentencing was to take place in

⁸ Taylor testified on cross-examination at the postconviction hearing:

Q. Well, did you think that your chances of not getting death were real good in front of a jury?

A. I knew that I didn't want to go in front of a jury.

Q. And why was that, Mr. Taylor?

A. Because I was admitting my guilt.

Q. I'm not talking about the issue of guilt. I'm talking about the issue of punishment. Did you want to go in front of a jury for them to decide whether you would live or die?

A. *Not then* but now I do. [PCR Tr. 622-23, emphasis added.]

what is known as "Criminal A," a courtroom located in a portion of the Jackson County Corrections Building. This courtroom, though thoroughly modern in its appointments, is compact and places the judge and counsel in close proximity. Prisoners enter through a side door at some distance from the bench, near a bailiff's station. The judge enters immediately behind the bench from a corridor along which are located a chambers suite, various offices, and an elevator.

On the morning of May 3, the trial judge conducted a domestic relations docket in his usual division in the main Jackson County Courthouse. Nothing remarkable occurred, although the mood was somber. Toward the noon hour, the judge instructed his staff to rendezvous with him to walk over to "Criminal A" shortly before the scheduled one o'clock sentences. He said that he was going to move his car. He was gone for less than an hour, during which time he was observed by Kent Gipson in a local establishment, called The Zoo, which specialized in serving liquor. He was not seen to consume anything and was observed by the witness Gipson to leave, with an unremarkable gait and demeanor. He returned to his regular courtroom, assembled his staff, and they walked over to the criminal courtroom. Shortly after arriving, the judge donned his robe, obtained a cup of coffee and stood in the corridor, occasionally exchanging a remark with the various people who were filtering in.

Eventually, court convened. Nunley was to be sentenced first. Following introductory remarks, the trial judge sentenced him to death. The trial judge made both oral and written findings. See Trial Tr. 593-606. Five statutory aggravating circumstances

were found beyond a reasonable doubt: depravity of mind (in that the victim was killed after she was bound or otherwise rendered helpless, exhibiting callous disregard for the sanctity of all human life); murder in the course of attempted robbery; murder in the course of perpetration of rape; murder in the course of perpetration of kidnapping; and murder for the purpose of avoiding lawful arrest. Non-statutory aggravating circumstances were also found, including Nunley's prior convictions and that the murder was committed to prevent Ann Harrison from testifying as a witness. The trial court found one mitigating circumstance, that Nunley was under the influence of drugs at the time of the murder; however, all statutory mitigating circumstances were expressly found *not* to exist, including extreme mental or emotional distress and action under duress or domination of another. The aggravating circumstances were found sufficient warrant the death sentence, and they were found not to be outweighed by the mitigating circumstances. Finally, the trial judge indicated his awareness that he was not required to impose the sentence of death under any circumstances, but, he announced, "It isn't close."

Taylor was next sentenced. The trial judge made similar oral and written findings regarding his case; finding the same aggravating and mitigating circumstances as in Nunley's case, and determining that Taylor likewise should be sentenced to death.

During the sentencing proceedings on May 3, McClain, Delk, Arnold, and Hall detected the odor of alcohol. Other persons present also detected the odor, which appeared to most to be coming from the bench. However, at no time did the trial judge in fact

exhibit any other indication that he was under the influence or at all intoxicated. His statements were coherent and this Court rejects contrary testimony as not credible.⁹ The judge's apparent lack of observation of Nunley at the outset is readily explained by the location of the door through which prisoners enter, and the inference that Nunley was initially seated on a bench near that door, not standing directly before the bench. To the extent that the trial judge displayed any confusion about the charges against Nunley and Taylor or the terms of Ch. 565, such confusion is consistent with the overwhelming evidence that May 3, 1991, was an exceptionally emotional, tense day for all concerned, and that the trial judge had not passed a death sentence for many years.

On the whole, the evidence preponderates in favor of the finding, and this Court so finds, that the trial judge had consumed an alcoholic beverage during the lunch hour prior to the formal sentencing proceedings. However, the Court also finds, beyond a reasonable doubt, that the quantity consumed was insignificant, that the trial judge was physically and mentally sober and competent during the proceedings, and was not in any way under the influence or intoxicated, as a matter of fact.¹⁰

⁹ The Court finds that the testimony of the witness Gasca, thoroughly discredited by an excellent cross-examination, is not credible and rejects it. However, the testimony of the witnesses Hook-Barton, Parkey, and Smith is entirely credible and is accepted by the Court.

¹⁰ To the extent that evidence was offered to establish that the trial judge had a reputation for imbibing before conducting afternoon judicial proceedings, the Court has considered the offers of proof on this subject and rejects them. Even assuming

Prior to the formal sentencing, the State had submitted proposed findings and judgments in each case. The trial judge made written findings in each case which differed significantly from the proposed findings. In particular, the trial judge rejected the State's theory that Nunley had directed Taylor to commit the murder, and that Taylor had acted under that direction. The trial judge in effect found (with ample support in the record) that Nunley and Taylor had each been a full partner in the murder.

Other findings of fact may be set forth hereinafter, as necessary, in the course of discussing the legal issues raised herein.

Claims and Issues

Taylor's *pro se* and amended motions for relief under Rule 24.035 contain a concatenation of claims which may be described generally as claims of ineffective assistance of counsel and denial of due process and equal protection. With regard to alleged

them to be true, as the Court is willing to do, they do not suffice to permit a finding that the trial judge had either the reputation or the habits of conducting judicial business in an intoxicated state. There is no evidence, either by offer of proof or otherwise, from which this Court would find that the trial judge habitually consumed alcohol during the lunch hour to the point of being under the influence or intoxicated when conducting afternoon business. It should also be noted that none of the reputation evidence, either by offer of proof or otherwise, establishes that the trial judge's reputation was that he was an incompetent judge. On the contrary, even factoring in the reputation regarding alcohol, the only permissible finding would be that the trial judge was universally regarded as a fit and competent judge. Finally, this Court finds that the record wholly fails to establish or even suggest that the trial judge had a "severe and incapacitating dependence" on alcohol, see Taylor *pro se* motion, ¶9(a)(3).

denial of effective assistance of counsel, Taylor alleges that counsel was ineffective because (1) no change of venue was sought in his case, (2) trial counsel were denied or otherwise failed to secure sufficient funds to retain forensic experts to testify concerning the effects of Taylor's cocaine intoxication on his mental state at the time of the crimes, (3) trial counsel had a conflict of interest arising out of the nature of the operation of capital litigation offices, the allocation of funds for experts by the Public Defender System, and the dismissal of Leslie Delk from her employment, (4) trial counsel failed to apprise Taylor of his statutory rights, including the possibility of jury sentencing under §565.006.2, (5) trial counsel failed to react properly to the consumption of alcohol by the trial judge during the proceedings and ignored the trial judge's "severe and incapacitating dependence on alcohol" in advising Taylor to plead guilty and proceed with a sentencing hearing; and (6) failure to object to inadmissible evidence during the sentencing hearing. See original motion, ¶¶ 9(a)&(b), amended motion, ¶¶ 3(a)-(e), 4, 10.

Insofar as claims of due process and equal protection deprivations are concerned, Taylor contends that he was denied due process or equal protection because (1) the trial judge consumed alcohol, (2) he was denied his right to trial by jury, (3) he did not waive his right to trial by jury, and (4) his age, race, and socio-economic circumstances were substantial factors in the State's decision to seek the death sentence. Taylor amended motion, ¶¶ 5-9, 11.

Nunley's *pro se* and amended motions for relief under Rule 24.035 parallel the claims and allegations asserted by Taylor, raising the same general cate-

gories of issues, although differing in details, and language. In brief, Nunley alleged violations of his rights to due process and equal protection in that (1) the refusal of the State to offer a plea bargain for life without parole in his case was an unconstitutional instance of racially motivated, selective prosecution, as well as a surrender of the prosecutor's discretion to third parties (the victim's family and "pressure groups"), (2) he was denied his right to trial by jury generally, and through lack of waiver, lack of knowledge of his statutory rights under §565.006.2, and due to improper venire-summoning procedures in Jackson County, (3) the trial judge was not a sober fact finder due to his drinking, (4) aggravating circumstances as alleged were overbroad and invalid limitations were placed on evidence of mitigating circumstances, (5) the same judge sentenced him after hearing the case against the codefendant Taylor, (6) he was incompetent at the time of his plea, (7) the prosecutors were guilty of misconduct in arguing inconsistent theories against Nunley as opposed to Taylor and in failing to raise the matter of the trial judge's drinking, and (7) the Missouri death penalty statute is unconstitutional. See original motion, ¶¶ 8(c), 9; amended motion, ¶¶ 1, 5, 6, 9-18, 20, 21.

Nunley also alleged manifold instances of error by his trial

[pages missing from original]

Trial Tr. 22-24 (plea), 301-401 (testimony of defense witnesses Lipson and Evans); Def. Plea Ex. 1-3. There is simply no basis whatever for relief on this claim. See *Short v. State*, 771 S.W.2d at 864.

Racial Discrimination

As far as this Court can tell, the underlying criminal cases represent the first time in over a decade that the Jackson County Prosecuting Attorney has refused to recommend a sentence of life imprisonment without parole in exchange for a plea of guilty to murder in the first degree. This fact is not in dispute, and from it arises movants' pleaded claims of unconstitutional selective prosecution on the basis of race.¹¹

Both the movants are black. The victim, Ann Harrison, was white. Insofar as the sentencing hearings conducted were concerned, the record is unclear as to the race of the witnesses, except that the police officers who obtained confessions from both Taylor and Nunley were white, and, presumably, the family members testifying during the penalty phase in behalf of the defense were black. The Jackson County Prosecuting Attorney, Albert Riederer, is white. It is indubitable that he alone exercises the authority to decide when his staff will seek a death sentence in every murder first degree case, albeit others give advice and counsel.

Data compiled by movants' counsel, and not seriously contested by the State,¹² reflect that, since

¹¹ Movants alleged unlawful selective prosecution based on age and socio-economic status, as well. See Taylor amended motion at ¶11; Nunley amended motion at ¶9. However, both movants were in their twenties at the time of the offenses, and neither their age nor their "socio-economic status" makes them members of a cognizable group for Equal Protection purposes. Those claims are, perforce, rejected out of hand. See *Wayte v. United States*, 470 U.S. 598, 608 n. 10 (1985).

¹² Movants filed an appendix of exhibits together with a brief on their claims of racial discrimination. The State has

1988, the great majority of murder first degree cases in Jackson County have involved perpetrators and victims of the same race. By the Court's count (based on data in Movants' Ex. 2), approximately 79, or 80%, of such cases where the race of both parties is identified did not involve interracial homicide. Of the remaining 19 cases, or 20%, all but 2 cases involved black defendants and white victims. Thus, since 1988, and possibly since 1985 (see Movants' Ex. 2, 2A, and 3),¹³ there have been only two murder first degree cases in which the alleged perpetrators were white and the victims were black. One of these was the Stancliffe case, in which a white male bound and smothered or strangled a black female. In that case, both parties were adults and there is some suggestion in the record that there had been a friendship, possibly even a lovers' relationship, prior to the killing.

With regard to *all* murder first degree cases during 1988-91 in which the defendant chose to plead guilty

objected to the appendix. The Court sustains the State's objections to Exhibits 1, 6, and 7 contained in that appendix, on the grounds that those exhibits are both hearsay and irrelevant. The remaining exhibits contained in the appendix will be admitted into evidence. The data contained in the admitted exhibits are not particularly clear; however, in light of the delay by the State in responding to discovery requests on this issue, the Court will endeavor to construe them in a light most favorable to movants.

¹³ The Court limited discovery to a three year period, considering that a reasonable time frame. The Court does not mean to hold that cases arising at any time during the current Jackson County Prosecutor's tenure would be in fact irrelevant; however, in light of the weighty governmental interest in preventing disclosure of plea bargaining information, as well as the Court's belief that comparable cases of recent vintage would more likely lead to discovery of admissible evidence than cases dredged up from long ago, the three year period was settled upon.

to that offense, the Jackson County Prosecutor (Albert Riederer, the current prosecutor) uniformly agreed to recommend a sentence of life without parole. Thus, in numerous prior cases involving black defendants and white victims, the Jackson County Prosecutor invariably agreed to a plea bargain. For example, the cases of Cory Heard, Jason Tatum, Walter Reynolds, and Anthony Alder, among many others, all resulted in black defendants pleading guilty in murder first degree cases involving white victims, pursuant to plea bargains, sometimes involving reduced charges. As noted, the case of Ann Harrison is the first in which a plea agreement was refused.¹⁴ As far as appears from the record, it is also the first case in memory in which a teenager of any race was abducted while awaiting her school bus, by two prior offenders using crack cocaine, raped, robbed, stabbed repeatedly, and left to die in the trunk of a stolen car.

Prosecutorial discretion is broad, but not unfettered; a particular decision to prosecute, and, *a fortiori*, to decline a plea bargain, must not be deliberately based upon an unjustifiable standard such as race. *Wayte v. United States*, 470 U.S. at 608-09. Selective prosecution claims should be judged according to ordinary equal protection standards, giving due regard to the essential role of dis-

¹⁴ The case of Ricky Ramsey is pointed to by movants as another instance in which a black defendant was refused a plea bargain. In that case, the defendant was charged with killing two white men. The victims' family members used racial epithets in a meeting with the Prosecuting Attorney at which they demanded he seek the death sentence. At first, he declined to recommend a plea bargain, but ultimately agreed to recommend a sentence of life without parole after discovery brought to light the family's comments.

cretion in prosecuting capital cases. Compare *Wayte v. United States* with *McCleskey v. Kemp*, 481 U.S. 279 (1987). Absent some facially discriminatory classification, a criminal defendant claiming illegal racial discrimination in prosecution must prove that the State's conduct had both a discriminatory effect and a discriminatory purpose, i.e., that race was a substantial factor in the decision. Proof of intentional discrimination is not established by effects alone, *Washington v. Davis*, 426 U.S. 229 (1976); in addition, the claimant must prove the necessary intent or purpose, either by adducing a pattern of conduct in similar situations so stark that discriminatory intent may be inferred, or by adducing other direct or circumstantial evidence of discriminatory purpose. *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977). Ordinarily, if a prima facie case of discrimination (i.e., a sufficient showing to permit an inference of discrimination) is made by the claimant, the burden of going forward will shift to the opponent to articulate legitimate, nondiscriminatory reasons for his actions. The claimant may then attempt to demonstrate that the articulated reasons are pretexts.

In the capital sentencing context, however, certain other considerations obtain, which affect the burden-shifting components of proof in an equal protection case. "Because discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused." *McCleskey v. Kemp*, 481 U.S. at 297. Thus, in the criminal prosecution context, a defendant claiming illegal discrimination must establish a substantial case of specific discriminatory intent in *his* case, before the prosecutor

can be required to explain his conduct and before the Court could infer illegal discrimination. *Id.*, n. 18. Evidence of discrimination by the prosecutor in employment practices or jury challenges in other cases is of doubtful utility in carrying the defendant's burden as expounded by *McCleskey*.

In the case at bar, movants rely primarily on the uniqueness of the Prosecuting Attorney's decision to insist on seeking the death penalty as evidence of discriminatory intent. Never before, they reason, has this Prosecuting Attorney refused to recommend a life sentence in exchange for a plea of guilty in a murder first degree case; the defendants here are black, and the victim is white; the reason must be the race of the defendants. Q.E.D. But the very uniqueness of the circumstances of the murder of Ann Harrison vitiates the inference movants call upon the Court to draw. If the circumstances of the murder of Ann Harrison are indeed unique, why do they not dictate a different decision on the part of the Prosecuting Attorney, a unique decision, if you will?

Of equal importance, the data compiled by the movants simply fail to raise any permissible inference that discrimination was at work in movants' cases. No similarly situated white defendant has been treated differently than Taylor and Nunley. The closest comparison is the Stancliffe case, but, as noted above, that case was factually distinguishable from the killing of Ann Harrison. The only thing that the movants have demonstrated with their litany of horrible crimes which resulted in plea bargains is that the Jackson County Prosecutor has been unbelievably lenient. This Court cannot, it is true, fathom why some of the cases (e.g., Ray Shawn Jackson) resulted in plea bargains, but whatever the reasons

were (and in the Jackson case one can speculate that the likelihood of an insanity defense loomed large), the movants have not proved that they were based on race, or, more pertinently, that racial discrimination is such a commonplace in decision-making in the Jackson County Prosecutor's mind that it necessarily infected the decision regarding Taylor and Nunley.

Finally, the Court observes that, under Missouri law, a trial judge is neither obliged to accept a plea bargain when one is made, nor obliged to sentence a defendant to death when there is no bargain. Rule 24.02(d)4; §565.030.4(4); cf. *Brown v. State*, 821 S.W.2d 13 (Mo.App. 1991). In a jury-waived sentencing procedure, the trial judge performs substantially the same function as a jury in shielding a defendant from the effects of racial discrimination. Cf. *McCleskey*, 481 U.S. 309-10. In this case, it is doubtful that the motives of the prosecutor, even if discriminatory, are causally related to the death sentences actually handed down. Causation questions aside, however, it is clear that Taylor and Nunley were refused a plea bargain solely on the basis of the particularized nature of their crime and their own particularized characteristics, without reference to race, as an act of independent judgment by Prosecutor Riederer and not as a result of the views of the Harrison family.

Movants contend that their evidence is at least sufficient to warrant a further evidentiary hearing on the issue of racial discrimination, relying on a dissenting opinion in *Blair v. Armontrout*, 916 F.2d 1310 (8th Cir. 1990), as well as on a series of citations to cases in which Jackson County prosecutors purportedly exercised peremptory challenges on the

basis of race. The dissenting federal judge's bald statement that "[r]ace plays an especially influential role in capital sentencing decisions," 916 F.2d at 1351, stands in marked contrast to the principles enunciated in *McCleskey v. Kemp*, with which the dissenter in *Blair* clearly disagrees. Fortunately, this Court is not bound even by majority opinions of the United States Court of Appeals, still less by meretricious dissents. It was and is movants' burden to *prove* by evidence, not by the *ipse dixit* of a dissenting federal judge, that race was a motivating factor in the decision to seek the death sentence against Taylor and Nunley in particular. They have not done so. "Exceptionally clear proof" of illegal motivation is wholly absent. On the contrary, the Court finds beyond doubt that the Prosecuting Attorney's decision to seek the death sentence against Taylor and Nunley was soundly based on the facts of the murder of Ann Harrison; her race and the defendants' race were of no consequence.

Since movants have failed even to make a *prima facie* case, there is no further need to explore their claims at an evidentiary hearing, for the State has no burden to articulate nondiscriminatory explanations for the decision to seek the death sentence here. The claim of racially discriminatory selective prosecution must be rejected, and the request for a further hearing will be denied.

Assistance of Counsel at Plea and Sentencing

Both movants allege that they were denied effective assistance of counsel. Because of the bifurcated nature of the plea and sentencing process in this

case, constitutional standards¹⁵ governing assistance of counsel must be applied discretely to each phase of the proceeding. See *Strickland v. Washington*, 466 U.S. 668 (1984); *Sanders v. State*, 738 S.W.2d 856 (Mo. banc 1987); *State v. Bibb*, 702 S.W.2d 462, 464 (Mo. banc 1985).

The general principles governing evaluation of postconviction claims of ineffective assistance of counsel have been canvassed in countless cases and will not be reiterated anew in this already prolix memorandum. Suffice it to say that the standards are succinctly summarized in *Kimmelman v. Morrison*, 477 U.S. 365, 374-75, 381-87 (1986) and *State v. Feltrop*, 803 S.W.2d at 20. The standards are rigorous, they presume that counsel's performance falls within the wide range of professional assistance, and they place the burden squarely on the defendant to establish both incompetence and prejudice flowing from that incompetence. *Id.* "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. at

¹⁵ The postconviction motions allege both federal and state claims. Unless otherwise noted, this Court has concluded that the standards under both federal and state constitutions are identical. This is not an abdication of duty to construe the Missouri constitution on its own merits, but merely a recognition that the Missouri constitution's concepts of due process and equal protection are not, at least in this context, more stringent than the federal provisions as currently construed. Thus, contrary to Justice Stevens' plaint, *Massachusetts v. Upton*, 466 U.S. 727, 731 (1984), it would not conserve this Court's resources to decide state questions first, since they are for the most part not dispositive.

686. In the guilty plea context, the prejudice inquiry requires the defendant to show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial; this in turn calls for an objective assessment of whether different action by counsel would have been likely to change the recommendation to plead and the probable outcome of a trial. *Hill v. Lockhart*, 474 U.S. at 58-60.

The bulk of the allegations of both movants concerning ineffective assistance of counsel do not pertain to their pleas as such, but focus on the sentencing phase. Both expressed themselves satisfied with counsel during their plea colloquies, and the record is clear that trial counsel for both Taylor and Nunley thoroughly investigated each case, filed pretrial motions on every conceivable issue in the case, secured evaluations of each client's mental status, conducted full and complete discovery of the State's case, and reached an informed, reasonable recommendation that each client plead guilty. Their respective trial counsel fully advised Taylor and Nunley about the merits of the cases against them, possible defenses, and the likelihood of success. The impossibility of a plea bargain was discussed and understood by each defendant, and the slight chances of success (defined as avoidance of a death sentence) before a jury were clearly communicated. Both defendants recognized that they had no defense to the murder first degree charge, and expressed their willingness to plead guilty at an early stage. The only unprofessional errors which conceivably are claimed to have affected Taylor's and Nunley's guilty plea are Taylor's allegations of "conflict of interest" and both movants' allegations

concerning failure of trial counsel to advise them of the possibility of jury sentencing under §565.006.2.

Taylor's claims of "conflict of interest" are chimerical. The facts of record establish no actual conflict of interest affecting his plea or adversely affecting his counsel's performance in regard to the plea. On the contrary, the changes in his representation were designed to obviate any possible conflict of interest, and expert assistance *was* obtained by his counsel on their own initiative. Furthermore, the evidence of record shows that the Missouri Public Defender System did not deny Taylor's counsel access to funds for experts for any reason other than a shortage of available funds—a shortage that was obviated by trial counsel's adroit use of Dr. Fleming and by the trial judge's offer to make local funds available if needed. "In order to establish a violation of his Sixth Amendment rights, a defendant must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980); see also *Burger v. Kemp*, 483 U.S. 776 (1987). Taylor has failed to demonstrate such a conflict in regard to his plea, and, accordingly, the plea may stand. *Dukes v. Warden*, 406 U.S. 250 (1972).

The dead letter of §565.006.2 looms large in this case, for the sole reason that, in hindsight, it is apparently the one thing that trial counsel for each movant completely overlooked. The provision is as follows:

No defendant who pleads guilty to a homicide offense or who is found guilty of a homicide offense after trial to the court without a jury shall be permitted a trial by jury on the issue of punishment to be

[ILLEGIBLE], anywhere else in Missouri, at the [sic]

This provision has not been construed by any reported case, although it was alluded to in *State v. Bibb*, 702 S.W.2d 464. More importantly, it had *never* been invoked in Jackson County, or, so to eliminate any time movants entered their pleas in 1991. Applying the usual principles of statutory construction, it seems clear to this Court [ILLEGIBLE] purpose of that [ILLEGIBLE].

uncertainty about whether a defendant had a statutory right to jury sentencing after a plea of guilty was entered. The statutory provision thus eliminates any role for a jury in sentencing after a guilty plea, unless there has been an agreement by the prosecutor that a jury should be empaneled. Thus, the statute confers no right whatsoever on a defendant; it confers on the State the power to authorize a jury sentencing proceeding if it chooses to do so.

Under all the circumstances, the Court does not find that trial counsel's overlooking of \$565,006.2 in advising Taylor or Nunley is an error falling outside the wide range of professional assistance. In the first place, the facts of this case were such that it was entirely reasonable for counsel to eschew jury involvement altogether. That being so, it was hardly unreasonable to fail to consider a statutory provision that had never been employed before, and the thrust of which was to *eliminate* possible intervention of a jury after a guilty plea. Secondly, at the time of the pleas in 1991, there was no reason to believe that the State would have consented to a jury sentencing proceeding if asked by defendants. Although it is a matter of speculation, the Prosecuting Attorney testified on deposition during the postconviction proceedings that he would not have

agreed to jury sentencing following guilty pleas by Taylor and Nunley, because the empaneling of a jury frequently generates claims of trial error, and if a jury did not have to be empaneled for the guilt phase, it did not seem sensible to create additional risk of error by empaneling one for the penalty. Riederer depo. at 70-71.

"The longstanding test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice among alternative courses of action open to the defendant.'" *Hill v. Lockhart*, 474 U.S. at 56. In each case here, each defendant was informed by counsel, and acknowledged as much during the plea colloquies, of all constitutional and statutory rights which he was waiving by choosing to plead guilty. Notwithstanding the provisions of §565.006.2, there were in 1991 (and would be today) only two courses open to Taylor and Nunley: plead not guilty and stand trial; or plead guilty and leave sentencing to the judge.¹⁶ No other courses were open to the movants, for any other course required the consent of the State, which the Court finds could not have been expected at the time.

Not only have movants failed to prove errors by counsel which render their pleas involuntary or

¹⁶ Movants apparently contend that trial counsel should have discussed with them the possibility of standing trial before a jury, admitting guilt to the jury, and throwing themselves on the mercy of the jury. This strategic option (in these cases, the functional equivalent of running head first into a flamethrower) is necessarily subsumed under trial counsel's consideration of whether a jury trial should be sought at all. Once trial counsel reasonably concluded (as they all did) that a jury trial would be fatal, variations on jury trial strategy became academic. Clearly, no unprofessional error is involved in not even thinking about this wholly unrealistic approach.

unintelligent, they also have wholly failed to show any prejudice arising from any conceivable error of counsel at the plea stage. On the contrary, the Court finds from movants' own testimony as well as the other evidence in the record that there is no reasonable probability that, but for any of the alleged errors of counsel, either defendant would have pleaded not guilty and insisted on going to trial. This is particularly true of the oversight regarding §565.006.2. The question is not whether, in retrospect, counsel should have presented the possibility of jury sentencing to movants and tried to obtain the State's consent. The question is whether, at the time of the pleas, an awareness of §565.006.2 would have changed counsel's recommendation to plead and probably secured a different trial outcome. *Hill v. Lockhart*, 474 U.S. at 59. The answer is a resounding "No!"

Indeed, movants' own testimony, together with other evidence adduced during the postconviction hearing, convinces the Court that both movants intended to plead guilty at all times during the underlying cases, and had no desire whatsoever to go to trial on any issue before a jury.

Turning to the sentencing phase, it is especially important to bear in mind that, while second-guessing of strategy is a universal pasttime of disgruntled lawyers, generals, and sportswriters, it is not the Court's function here. Because the strategy of pleading "open" to the trial judge did not succeed in evading the death sentence for Taylor and Nunley, it does not follow that counsel were ineffective. Movants must show that trial counsel's performance was deficient, in the sense that there were serious errors, and must further show that they were prejudiced by

these errors, to the extent that they did not receive a fair trial, producing a reliable result. *Strickland v. Washington*, 466 U.S. at 687.

Nunley's claims of ineffective assistance of counsel at the penalty phase need not detain us long. Leaving to one side the issue of what should have been done about the trial judge's alleged intoxication, Nunley's evidence fails to establish a single error of trial counsel falling outside the wide range of professional assistance. He presented no evidence concerning what, if anything, additional neurological tests or expert testimony would have added to his case. The Court has reviewed Dr. William Logan's report and finds nothing which materially differs from what was actually presented at the penalty hearing through other witnesses. Nunley's difficult childhood, educational background, drug addiction, and mental condition at the time of the crime were thoroughly explored at the penalty hearing, both by expert testimony and through family and other witnesses. E.g., Trial Tr. 301-401 (expert testimony). The only thing omitted, perhaps, was evidence of Nunley's behavior while in jail. However, there is no evidence anywhere in the record as to what that behavior actually was. The Court is willing to assume that it was good, but the Court cannot find that it was so good that its absence undermines confidence in the result reached. Moreover, the Court notes that the obvious focus of Nunley's case in mitigation was his upbringing and the effects of drug addiction. In all respects, Nunley's evidence falls far short of overcoming the presumption that trial counsel's performance was within the range of reasonable professional assistance. Finally, as *United States v. Cronin* teaches,

the presence or absence of Schenkenberg and the experience level of Arnold and Schlagel are insufficient of themselves to make out a case of ineffectiveness.

Taylor's claims of ineffectiveness add slightly different dimensions, but they are of no more merit than Nunley's. Again, the "conflict of interest" phrase is bandied about, without foundation. The clumsy and inept dismissal of Delk from her employment, though temporarily causing confusion and delay, did not create any actual conflict of interest adversely affecting Taylor's defense. *Burner v. Kemp*, supra. On the contrary, McClain and Delk reacted in a very professional manner to this development, and displayed commendable loyalty to Taylor's interests. See findings set forth *ante* at pp. 30-32.

Insofar as the presentation of evidence during Taylor's penalty hearing, the Court finds that Taylor has failed to carry his burden of overcoming the presumption mentioned above. Indeed, the Court finds that McClain and Delk presented an adequate case in spite of difficulties previously encountered. Taylor has presented no evidence at the postconviction stage¹⁷ suggesting what, if any, additional expert evidence could and should have been offered at the penalty hearing. To be sure, McClain and Delk testified that they would have liked to secure a neuropharmacologist and a social worker to buttress Taylor's claims concerning the effects of crack cocaine on him at the time of the murder, and con-

¹⁷ The question of funding for expert witnesses at the postconviction stage was addressed by this Court at an early date, and postconviction counsel were assured that funds would be made available from the Missouri Public Defender.

cerning his subservience to Nunley. However, such expert testimony was presented at the penalty hearing through Dr. Fleming, Trial Tr. 879-83, and the Nunley-Taylor relationship was also explored through the testimony of Taylor's relatives. Taylor had also been examined by other psychiatrists or psychologists, see Trial Tr. 636, and there is nothing in the record at any point to indicate that further testimony (such as that of Taylor's relative in California) on his mental state or background was essential to a fair presentation of Taylor's defense, such that trial counsel were deficient in deciding not to seek additional funds through the trial judge or a further continuance to obtain additional experts. See, e.g., *Laws v. Armontrout*, 863 F.2d 1377 (8th Cir. 1988) (en banc); *Roach v. Martin*, 757 F.2d 1473.

Lastly, we come to the issue, specifically raised only by Nunley, of failure to object when both of the underlying cases were assigned to the same judge and he heard all evidence on both before passing sentence. This Court can find no authority for the proposition that codefendants' cases cannot be heard by the same judge, as distinguished from the same jury. Indeed, some courts have adopted the expedient of empaneling separate juries for codefendants, who are then tried together before the same judge. See *United States v. Lebron-Gonzalez*, 816 F.2d 823 (1st Cir. 1987). Presumably the fact that the cases are tried before one judge, who will sentence both defendants, suffers no constitutional infirmity. Thus, movants have not established that the failure of trial counsel to object to both cases being assigned to one judge was an error at all.

In any event, Taylor and Nunley pleaded guilty separately, evidence concerning penalty was heard

at separate hearings, and they were sentenced separately, albeit successively on the same day, with entry of separate and distinct written findings as to each. The trial judge refused to allow Taylor's confession to be admitted into evidence in Nunley's proceeding, and his findings (oral and written) betray no indication that evidence admitted only against one defendant was considered in the case against the other, except to the extent that certain evidence (chiefly concerning undisputed facts about the circumstances of the crimes) presented in the Nunley penalty hearing was admitted by stipulation in the Taylor hearing. Moreover, even if it might have been objectionable to have both defendants before the same judge, the record is clear that trial counsel for each defendant considered that issue to some extent, but made a reasonable judgment that the judge in question represented the best chance of avoiding a death sentence. This strategic judgment will not be overturned by this Court.

Jury Waiver

Melding allegations of ineffective assistance and denial of due process, movants contend that they did not waive their right to trial by jury, especially in light of their ignorance of §565.006.2, relying on *State v. Bibb*. In that case, a defendant pleaded guilty and was sentenced to death by the trial court. On appeal, the Supreme Court reversed, noting that, under the Missouri statutory scheme antedating §565.006.2, the trial process in a capital case consisted of distinct stages, guilt and punishment. The Court held that the defendant's equivocation on whether he wished to waive the right to have a jury

assess punishment failed to satisfy the commands of Mo. Const. art. 1, §22(a) and Rule 27.01(b), that waiver of right to trial by jury and the assent of the court appear from the record with "unmistakable clarity." *Bibb*, 702 S.W.2d at 466.

The Court has already addressed one facet of movants' claims that they did not effectively waive their right to trial by jury, rejecting the contention that trial counsel were ineffective in overlooking §565.006.2. Insofar as the intelligent and knowing character of their waiver of constitutional rights otherwise is concerned, the existence of § 565.006.2 not only does not negate their waiver, it actually reinforces it by establishing as a matter of Missouri law that a defendant who pleads guilty in a capital case has *no* right to a sentencing jury. For the rest, the plea colloquies, as evidenced by the exhibits to this memorandum, provide the "unmistakable clarity" that was lacking in *Bibb*, where the concluding remark of counsel was "that wouldn't be a final decision." 702 S.W.2d at 465.

The critical question here is whether the movants, at the time of their pleas, knew of the alternatives open to them, and made a voluntary and intelligent choice. The possibility of a sentencing jury under §565.006.2 was not an alternative open to movants; it was an option available to the State. Movants each knew full well that they could have a trial by jury on guilt and punishment; they chose to forgo that right, with the Court's assent, as provided by Mo. Const. art. 1, §22(a) and Rule 27.01. There is no infirmity in their waiver of trial by jury.

The Trial Judge

We come at length to the cynosure of this case: the claim concerning the trial judge's use of alcohol.

Here, too, threshold issues plague us. The State contends that this claim cannot be raised in the postconviction proceeding, since it could have and should have been raised by objection at the time. However, this Court cannot see any useful purpose in resorting to that evasion. If the judge's condition was such that counsel should have objected, the failure to do so could amount to ineffective assistance of counsel. Cf. *Kimmelman v. Morrison*, supra. In that context, if in no other, the issue must be faced. However, the allegations concerning the trial judge raise a fundamental question of denial of due process; even if an objection had been raised, it might have been necessary to have it resolved by a different judge. Under the circumstances, this Court concludes that Rule 24.035 affords a proper vehicle for raising the issue.

Movants contend that evidence concerning the trial judge's reputation or habit of conducting judicial proceedings after consuming alcohol should have been admitted. Character and habit evidence, offered to prove that a person in a specific instance acted consistently with his character or habit, is generally rejected in civil cases. This rule is firmly ensconced in Missouri law and in American law generally. *Haynam v. Laclede Elec. Co-op., Inc.*, 827 S.W.2d 200, 205-08 (Mo. banc 1992); *Rhineberger v. Thompson*, 202 S.W.2d 64, 71 (Mo. banc 1947); *McCormick on Evidence* §188, p. 445, §195, pp. 462-64 (Cleary ed. 1972); 1A J. Wigmore, *Evidence in Trials at Common Law* §68, p. 1444 (Tillers rev.

1983). The Court saw no reason to create an exception to this rule in postconviction proceedings, and excluded movants' proffered evidence, except to a limited extent for other purposes. The Court adheres to its rulings, and makes no finding beyond that already made: that, as far as movants' trial counsel were concerned, the trial judge was capable and lenient, if eccentric.

The Court's finding on the merits here is simple: on the day movants were sentenced—and at no other time during the proceedings in the underlying cases¹⁸—the trial judge had had a drink, but he was not drunk or even under the influence. The only effect alcohol had had was on his breath. That such circumstances may subject him to discipline, see, e.g., *Complaint concerning Kirby* 54 N.W.2d 410 (Minn. 1984), is not a matter for this Court. The controlling question is whether the mere consumption of alcohol by the trial judge on the day of formal sentencing deprived movants of due process.

Sensing that they have wholly failed (as they have) to prove that the trial judge was in fact intoxicated or in any way impaired by alcohol when he passed their death sentences, movants argue forcefully that a *per se* rule is required in capital cases: any proceedings conducted by a trial judge after he

¹⁸ Lest there be any uncertainty, the Court emphasizes that it rejects the retrospective ruminations of trial counsel that behavior which did not seem a result of alcohol at the time was, in hindsight, the result of intoxication. Thus, the idea that any momentary confusion of names or statutory provisions is evidence of intoxication or impairment of the judge is not accepted by this Court in light of compelling evidence that the judge was not in fact impaired in any way. See, e.g., PCR Tr. 306, lines 16-20; 648-49; 728-29, 733-34, 752.

has consumed alcohol must be invalidated, particularly where a sentence of death is actually passed by the judge without a jury. In support, movants rely on substantial authority that the consumption of alcohol by jurors in criminal and even civil cases is intolerable and requires reversal of any judgment without any further showing. See, e.g., *Schultz v. Valle*, 464 N.E.2d 354 (Ind.App. 1984); see generally Annot., 7 A.L.R.3d 1040, 1064-72 (1966). Movants also note the very grave appearance of impropriety.

The Court hesitates to claim that its research has been so thorough that it can say definitively that there is no case in Anglo-American legal history addressing the claim raised by movants; the Court can only say that it has searched the reported English and American cases (excluding the Year Books) and can find no case in point involving a judge. Resort must be had, therefore, to first principles.

"Due process implies a tribunal both impartial and mentally competent to afford a hearing." *Jordan v. Massachusetts*, 225 U.S. 167 (1912); cf. *Smith v. Phillips*, 455 U.S. 209, 217 (1982) ("Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen.") When the tribunal in question is a jury, actual bias must be shown before a due process violation arising out of lack of impartiality is established. *Smith v. Phillips*, 455 U.S. at 216. When the tribunal is a judge and not a jury, it has been held that justice must satisfy the appearance of justice, and any possible temptation to the average judge to lead him not to hold the balance "nice, clear

and true" imports a violation of due process, even in face of findings of no actual bias. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986). When mental competence is at issue, and the tribunal is a jury, due process is satisfied if the mental competence of the juror is established by a preponderance of evidence at a posttrial hearing, but it does not appear that the burden necessarily rests on the state to prove competence in the absence of substantial evidence of incompetence. *Jordan v. Massachusetts*, 225 U.S. at 176-77; cf. *Tanner v. United States*, 483 U.S. at 118-120. Finally, the Court notes the Supreme Court's observation in another context that "[p]er se rules should not be applied . . . in situations where the generalization is incorrect as an empirical matter; the justification for a conclusive presumption disappears when application of the presumption will not reach the correct result most of the time." *Coleman v. Thompson*, 111 S.Ct. at 2558.

Albeit there is respectable authority for a *per se* rule in cases of jurors who consume alcohol, there is an equally respectable line of cases rejecting any such rule, and demanding that there be in addition some showing of prejudice. Annot., 7 A.L.R.3d at 1044, 1072-87. Missouri finds itself firmly in the latter camp. In *State v. Johnson*, 586 S.W.2d. 437 (Mo.App. 1979), a jury in a murder case interrupted deliberations for dinner, during which several jurors consumed liquor, after which deliberations resumed and a guilty verdict was reached. At the hearing on the motion for a new trial, there was no evidence that any juror was intoxicated. Denial of a new trial was affirmed, the Court of Appeals holding that it was incumbent upon the defendant to prove that the mind of a juror was affected by the alcohol or suf-

ferred from some degree of intoxication. 586 S.W.2d at 442. This judgment comported with the common sense view, long held by Missouri courts, that consumption of a small amount of alcohol is not likely to be any more deleterious to the judgment of the average juror than the use of tobacco or coffee. See *State v. Taylor*, 35 S.W. 92, 105 (Mo. 1896). The Supreme Court of the United States, although presented with an opportunity, has not seen fit to consider whether the due process clause requires anything different. See *Lee v. United States*, 454 A.2d 770 (D.C.App. 1982), cert. denied *sub nom. McIlwain v. United States*, 464 U.S. 972 (1983) (a case where jury deliberations were recessed due to the drunkenness of a juror).

After considerable reflection, this Court has concluded that the Missouri rule applicable to jurors is in essence applicable to judges, and is consonant with the commands of the Fourteenth Amendment and Mo.Const. art. I, §10. The Court further concludes that, given the universal condemnation of the use of alcohol by jurors during proceedings in a criminal case—a condemnation more forceful in application to a judge, even if a *prima facie* violation of due process may be established by proof of actual consumption of alcohol by a judge sitting without a jury in a capital case, such a *prima facie* case can be rebutted by evidence adduced at a subsequent hearing which conclusively establishes that the judge was mentally competent. Cf. *Jordan v. Massachusetts*, 225 U.S. 176-77; *State v. Showley*, 67 S.W.2d 74, 90 (Mo. 1933) (the burden is on the State to disprove prejudice where the reasonable possibility thereof is shown).

The question of a judge's mental competency stands on a different footing than the question of impartiality. Competency deals with the judge's state of mind, an internal factor, whereas impartiality deals with the presence *vel non* of extraneous influences (i.e., pecuniary or personal relationships) affecting the judge's decisionmaking. Due process cannot tolerate the appearance of impropriety in matters affecting judge's impartiality, but surely it can safely look to substance in dealing with state of mind. For a *post hoc* inquiry into competency can ensure that justice satisfies both the reality and the appearance of justice, while the suspicions created by the existence of a direct pecuniary or personal interest in the outcome of a case can never be satisfactorily erased by such an inquiry.

The Court is fortified in its rejection of a *per se*, rule in this case by the common experience in the case of jurors, that prejudice to a defendant's substantial rights and to confidence in the administration of justice does not invariably flow from consumption of alcohol, and by the consciousness that a judge is subject to the same scrutiny of lawyers and court officers as jurors, and to forms of discipline to which jurors are not. Mo.Const. art. V, §24. Above all, the Court rejects the notion of a *per se* rule because judges, far more than jurors, should be assumed to have sufficient conscience and intellectual discipline not to preside over a capital case while under the influence of alcohol, cf. *United States v. Morgan*, 313 U.S. at 421, and it is clear to this Court that the administration of justice will not suffer if something more is required to overturn a manifestly correct judgment than evidence that a judge had a drink at lunch. Adoption of the movants'

view would be likely only to make capital litigation even more Sisyphean than it already is, cf. *Gomez v. United States District Court*, 112 S.Ct. 1652 (1992), by adding one more weapon to the postconviction litigator's arsenal: the routine allegation of the prisoner that he detected alcohol on the judge's breath at sentencing.

Here, even though movants proved actual consumption of alcohol by the trial judge, they failed to prove that the mind of the judge was affected thereby, and a plenary posttrial inquiry has left this Court in no doubt that Judge Alvin Randall was an impartial and mentally competent judicial officer at all times during the proceedings in the underlying cases, including formal pronouncement of sentence in each case. The credible evidence is conclusive that Judge Randall's mind and faculties were unimpaired and uninfluenced by any alcohol consumed.

This Court is not retained by the brewing or distilling industries, and cannot but animadvert on the trial judge's lapse in conducting such fateful proceedings with alcohol on his breath. Nevertheless, the due process clauses of the federal and state constitutions did not enact a Calvinistic teetotaler's code. Were the Court in the slightest doubt about the condition of Judge Randall's judgment on May 3, 1991, the motions for relief would be granted without hesitation. As it is, the Court denies them without hesitation.

What has been said about the issue of the trial judge disposes of the related claims of ineffective assistance of counsel and prosecutorial misconduct in failing to object or otherwise make a record concerning the judge's use of alcohol. Cf. *Trimble v. State*, 693 S.W.2d 267 (Mo.App. 1985). There was no

obligation of trial counsel to object when there was in fact no violation of the constitution being committed. In truth, like the canine inaction in the Sherlock Holmes story, the inaction of trial counsel on May 3, 1991 is telling. No matter how unexpected the odor of alcohol may have been, these attorneys, specialists and perhaps ideologues in the matter of capital cases, would certainly have made a record if there had been more than an odor of alcohol and the trial judge had not seemed in control of his thoughts and his actions. That no objection was made, while not a waiver, is a circumstance which weighs in the balance against any doubt about the judge's mental competency to preside that day. The prosecutor's inaction was and is irrelevant: "the misconduct's effect on the trial, not the blameworthiness of the prosecutor, is the crucial inquiry for due process purposes." *Smith v. Phillips*, 102 S.Ct. 947 n. 10. There was no misconduct, there was no effect on the underlying cases; there was and is no deprivation of due process.

Propriety of Death Sentences

As an additional safeguard to movants' rights, and because §565.035.3(1) appears to proscribe a death sentence imposed under the influence of "passion, prejudice, or any other arbitrary factor," this Court has reviewed the record of the underlying criminal cases to determine independently if the sentences of death were warranted. This may be purely a work of supererogation (or hebetude for the reader), but, under Rule 24.035, if this Court were convinced that the sentence imposed was illegal, or that there was a denial of constitutional rights, this Court would

have the power to "vacate and set aside the judgment and . . . discharge the movant or resentence him or . . . correct the judgment and sentence as appropriate." Rule 24.035(i).

This Court's independent review of the record leads the Court to find beyond a reasonable doubt that each defendant, after deliberation, knowingly caused the death of Ann Harrison. §565.020. In addition, at least four statutory aggravating factors were proved beyond a reasonable doubt, and indeed admitted by each defendant during his plea: (1) the murder of Ann Harrison was committed while each defendant was engaged in the perpetration of rape, §565.032.2(11); (2) the murder of Ann Harrison was committed while each defendant was engaged in the perpetration of robbery, §565.032.2(11); (3) the murder of Ann Harrison was committed while each defendant was engaged in the perpetration of kidnapping, §565.032.2(11); and (4) the murder of Ann Harrison was committed by each defendant for the purpose of avoiding lawful arrest of the defendants, §565.032.2(10). In addition, this Court would find and conclude that two additional statutory aggravating circumstances were proved beyond a reasonable doubt: (1) the murder of Ann Harrison was outrageously or wantonly vile, horrible or inhuman in that it involved depravity of mind on the part of each defendant, in the sense of a callous disregard for the sanctity of life, arising out of the fact that Ann Harrison was killed while she was bound or otherwise rendered helpless, §565.032.2(7) as construed in *State v. Griffin*, 756 S.W.2d 475, 489-90 (Mo. banc 1988); and (2) Ann Harrison was murdered because she was a potential witness in the investigation arising out of her kidnapping, which

investigation was in fact occurring at the time of the murder, §565.032.2(12); *State v. Petary*, 781 S.W.2d 534 (Mo. banc 1989)—this circumstance was, for some reason, found as a nonstatutory aggravating circumstance in the underlying cases. Of course, there was and is no dispute that each defendant has multiple prior felony convictions.

As far as mitigating circumstances are concerned, this Court finds that each defendant was in fact under the influence of crack cocaine when Ann Harrison was killed, that each defendant's judgment was to some degree impaired as a result, and that each defendant had exhibited remorse and a willingness to accept punishment by pleading guilty. §565.032.1(3). However, the Court does not find the existence of any statutory mitigating circumstance as set forth in §565.032.3. The Court emphatically rejects any contention that Taylor was dominated by Nunley, a contention refuted by the physical evidence showing that his weapon inflicted the principal wounds and that he alone actually had intercourse with Ann Harrison, and any contention that either defendant's ability to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired.

From its independent review of the record, this Court is convinced beyond any doubt that the aggravating circumstances of the murder of Ann Harrison greatly outweigh the mitigating circumstances, even excluding the issue of depravity of mind. Cf. *Zant v. Stephens*, 462 U.S. 862 (1983). Both defendants discussed the killing of Ann Harrison and came to a deliberate decision to do so, which they both then proceeded to put into effect; there is no question about their culpable intent. See *Tison v. Arizona*,

481 U.S. 137 (1987). Ann Harrison was kidnapped, raped, robbed, and then killed to avoid the consequences of those acts. Were it dealing with these cases as an original proposition, this Court would see no alternative but to turn a deaf ear to the pleas of Taylor and Nunley for mercy and to sentence them to death.

* * *

Due process as guaranteed by the federal and state constitutions is supposed to guarantee fairness, not perfection, in procedure. It is intended to limit the power of the State to deprive its citizens of life, liberty and property, but it is not and was not intended as a reservoir of subtleties to confound the plainest truth or arguments to color unjustifiable pretensions. Here, the adversary process functioned reliably. Trial counsel did their duty, and postconviction counsel have done theirs. The trial court entered a manifestly correct judgment and sentence, unaffected by any arbitrary factor, such as any alcohol consumed. Foul murder has been done, and the perpetrators have been brought to the bar of justice. As it was put in *Hamlet*: where the offense is, let the great ax fall.

ORDER AND JUDGMENT

In light of the foregoing, it is

ORDERED that the movants' motions for further hearing on the issue of race be and the same are hereby denied; and it is

FURTHER ORDERED that the motion of the State to dismiss be and the same is hereby granted in part

and denied in part in accordance with the views expressed in the foregoing memorandum; and it is

FURTHER ORDERED that all orders sealing depositions or other matters of record herein are vacated and dissolved, and the entire record herein shall be and remain a public record; and it is

FURTHER ORDERED, ADJUDGED AND DECREED that the motion of Michael Taylor for relief under Rule 24.035 be and the same is hereby denied and dismissed with prejudice, and the judgment of conviction and sentence on all counts, including the sentence of death, in 16th Cir. No. CR89-4934, shall stand in full force and effect, and the death warrant heretofore entered shall be executed as prescribed by law; and it is

FURTHER ORDERED, ADJUDGED AND DECREED that the motion of Roderick (Roger) Nunley for relief under Rule 24.035 be and the same is hereby denied and dismissed with prejudice, and the judgment of conviction and sentence, including the sentence of death, in 16th Cir. No. CR89-3323, shall stand in full force and effect, and the death warrant heretofore entered shall be executed as prescribed by law.

SO ORDERED:

/s/ ROBERT H. DIERKER, JR.
Robert H. Dierker, Jr.
Special Judge

Dated: July 1, 1992

80a

cc: Counsel of record

Clerk, Supreme Court of Missouri

A TRUE COPY - ATTEST

CIRCUIT COURT OF JACKSON COUNTY, MO.

COURT ADMINISTRATOR'S OFFICE

DEPARTMENT OF CIVIL RECORDS

BY /s/ RUTH SCHULZE DCA

81a

IN THE CIRCUIT COURT
OF JACKSON COUNTY, MISSOURI
AT KANSAS CITY

Division 4
Case No. CR89-4934

STATE OF MISSOURI,

Plaintiff,

—VS.—

MICHAEL TAYLOR,

Defendant.

FINDINGS, JUDGMENT AND SENTENCE

NOW ON THIS 3rd day of May, 1991, the defendant, Michael Taylor, appears in person and by his attorney Leslie Delk, the State of Missouri also appears by its attorneys, Patrick B. Hall and Patrick Peters:

The defendant appeared before this court on February 8, 1991 and entered pleas of guilty to the charges of Count I Murder in the First Degree, a Class A felony; Count II Armed Criminal Action, a Class A felony; Count III Kidnapping, a Class B felony; and Count IV Rape, a Class A felony, and the Court accepted those pleas of guilty and found the

defendant guilty of each of those offenses beyond a reasonable doubt;

The defendant again appeared before this court in person and by counsel on April 23 through April 25, 1991 and evidence was presented by the State and by the defendant regarding the appropriate punishment for the crimes to which the defendant plead guilty on February 8, 1991.

On this 3rd day of May, 1991, defendant is given allocution; and

The Court, having heard the defendant's pleas of guilty, the evidence presented in the April 23 through 25, 1991 hearing, and the arguments of counsel makes the following findings based solely on defendant's pleas of guilty on February 8, 1991 and the evidence and arguments presented on April 23 through 25, 1991.

I. FINDINGS AS TO MURDER IN THE FIRST DEGREE

A. Statutory Aggravating Circumstances:

The Court finds beyond a reasonable doubt the following statutory aggravating circumstances:

1) The murder of Ann Harrison involved depravity of mind and, as a result thereof, the murder was outrageously and wantonly vile, horrible and inhuman. The Court finds beyond a reasonable doubt that the defendant killed Ann Harrison after she was bound or otherwise rendered helpless by defendant and Roderick Nunley and that defendant thereby exhibited a callous disregard for the sanctity of all human life.

2) The murder of Ann Harrison was committed while defendant was engaged in the attempt to perpetrate robbery.

3) The murder of Ann Harrison was committed while the defendant was engaged in the perpetration of rape.

4) The murder of Ann Harrison was committed while the defendant was engaged in the perpetration of kidnapping.

5) The murder of Ann Harrison was committed for the purpose of avoiding a lawful arrest of defendant or Roderick Nunley or both.

B. Non-Statutory Aggravating Circumstances:

The Court finds beyond a reasonable doubt the following non-statutory aggravating circumstances:

1) Defendant was found guilty on March 8, 1985 of the following crimes and sentenced to six (6) years in the Missouri Division of Adult Institutions in Division 2 of this Court:

- a) CR84-2088 - Burglary in the Second Degree;
- b) CR84-2089 - Burglary in the Second Degree and Stealing Over \$150;
- c) CR84-2231 - Burglary in the Second Degree and Stealing Over \$150;
- d) CR84-2232 - Burglary in the Second Degree and Stealing Over \$150;
- e) CR84-2233 - Burglary in the Second Degree and Stealing Over \$150;
- f) CR84-2856 - Burglary in the First Degree;
- g) CR84-3589 - Tampering in the First Degree;

2) Defendant murdered Ann Harrison to prevent her from testifying against him for the crimes he and another committed against her on March 22, 1989.

C. Sufficiency Of Aggravating Circumstances:

The Court finds that all of the evidence relating to the murder of Ann Harrison and the above listed aggravating circumstances are sufficient to warrant the imposition of death as punishment of defendant.

D. Mitigating Circumstances:

1) The court finds the following mitigating circumstance:

a) At the time of the murder of Ann Harrison, the defendant was under the influence of drugs.

2) In considering the statutory mitigating circumstances listed in Section 565.032.3, RSMo, the court specifically finds the following beyond a reasonable doubt:

a) At the time of the murder in the first degree of Ann Harrison, the defendant was *not* under the influence of extreme mental or emotional disturbance;

b) Ann Harrison was *not* a participant in the defendant's conduct and Ann Harrison did *not* consent to the act;

c) The defendant was *not* merely an accomplice in the murder in the first degree of Ann Harrison and the defendant's participation was *not* relatively minor;

- d) The defendant did *not* act under duress or under the substantial domination of another person;
 - e) The capacity of the defendant to appreciate the criminality of his conduct and to conform his conduct to the requirements of law was *not* impaired and the defendant is not mentally retarded;
 - f) The age of the defendant at the time of the crime is *not* a mitigating circumstance;
- 3) In considering all the evidence presented, the court does not find mitigating circumstances sufficient to outweigh the aggravating circumstances found to exist.

E. Appropriate Punishment For Murder in the First Degree:

- 1) Under the above findings, the court finds that the sentence of death is the only appropriate punishment in this case and for this defendant;
- 2) In making such a finding the court realizes that the court is *never* compelled to fix death as the punishment even though the court did not find the evidence of one or more mitigating circumstances sufficient to outweigh the aggravating circumstances found to exist.

II. JUDGMENT AND SENTENCE

As to Count I, it is adjudged that the defendant has been found guilty upon his plea of guilty of the offense of Murder in the First Degree, a Class A

felony. It is adjudged that the defendant is hereby sentenced to suffer the punishment of death;

As to Count II, it is adjudged that the defendant has been found guilty upon his plea of guilty of the offense of Armed Criminal Action, a Class A felony. It is adjudged that the defendant is hereby sentenced and committed to the custody of the Missouri Division of Adult Institutions for imprisonment for a period of ten (10) years, such sentence to run consecutive with the sentence imposed in Count I;

As to Count III, it is adjudged that the defendant has been found guilty upon his plea of guilty of the offense of Kidnapping, a Class B felony. It is adjudged that the defendant is hereby sentenced and committed to the custody of the Missouri Division of Adult Institutions for imprisonment for a period of fifteen (15) years, such sentence to run consecutively with the sentences imposed in Counts I and II;

As to Count IV, it is adjudged that the defendant has been found guilty upon his plea of guilty of the offense of Rape, a Class A felony. It is adjudged that defendant is hereby sentenced and committed to the custody of the Missouri Division of Adult Institutions for imprisonment for life, such sentence to run consecutively with the sentences imposed in Counts I, II and III.

Defendant will be delivered directly to Potosi Correctional Center.

The court finds no probable cause to believe that defendant's counsel was ineffective.

It is ordered that judgment be and is hereby entered in favor of the State of Missouri and against defendant for the sum of \$68.00 for the Crime Victim's Compensation Fund and that execution issue therefore.

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It is ordered that the Court Administrator deliver a certified copy of his judgment and commitment to the Jackson County Department of Corrections and that the copy serve as the commitment of the defendant.

/s/ [ILLEGIBLE]
Judge, Division 4

May 3, 1991
Date

IN THE JACKSON COUNTY CIRCUIT COURT
SIXTEENTH JUDICIAL CIRCUIT – DIVISION 4
Honorable Alvin C. Randall, Judge

Case No. CR89-4934

STATE OF MISSOURI,

Plaintiff,

—v—

MICHAEL TAYLOR,

Defendant.

TRANSCRIPT OF PROCEEDINGS
OF GUILTY PLEA

The following proceedings came on for hearing on Friday, February 8, 1991, before the Honorable Alvin C. Randall, Judge of Division 4 of the 16th Judicial Circuit at Kansas City.

APPEARANCES

FOR THE PLAINTIFF:

Mr. Patrick Hall
Asst. Prosecuting Attorney
Jackson County Prosecutor's Office
415 East 12th Street
Kansas City, Missouri 64106

FOR THE DEFENDANT:

Mr. Martin J. McClain and
Ms. K. Leslie Delk
Central Capital Litigation Division
Office of State Public Defender
3402 Buttonwood
Columbia, Missouri 65201

* * *

[3] THE COURT: All right. Raise your right hand.

(The defendant Michael A. Taylor was duly sworn by the Court.)

THE COURT: Be seated.

EXAMINATION BY MR. MCCLAIN:

Q Michael, can you state your name for the record, please.

A Michael A. Taylor.

Q Michael, are you aware that there has been an Information filed in this case charging you with four counts?

A Yes, I am.

Q And do you understand why we're here today?

A Yes, I do.

Q And why are we here?

A For me to enter my guilty plea.

* * *

[8]A I'm not—

Q That's the up to life?

A Yes.

Q The five to life?

A Yes.

Q We've talked about that?

A Yes, we did.

Q Do you feel you understand the charges?

A Yes, I do.

Q Do you feel you understand the penalty that's involved?

A Yes, I do.

Q Do you understand that the penalty for the murder charge, if you plead guilty, the least that you can get is life without parole?

A Yes, I do.

Q So that you know, regardless of all the other sentences, you're going to have to do life without parole?

A Yes.

Q Do you also understand that if you plead guilty it will be up to the Judge to decide the sentence on all charges?

A Yes.

Q And as the maximum that you can get on all of these [9] charges do you understand that the Judge can give you the death sentence?

A Yes.

* * *

Q Now, do you understand that you have a right to plead not guilty?

A Yes.

Q And you have a right to plead guilty.

A Yes.

A If you plead not guilty, do you understand that you have a right to go to trial?

A Yes.

Q And if you plead not guilty, there would be a trial.

A Yes.

Q Do you understand that the trial would be in front of a jury of 12 people?

A Yes, I do.

* * *

[28]Q And do you understand that there will be a sentencing proceeding yet to occur in front of the Judge?

A Yes, I do.

MR. MCCLAIN: I don't believe I have anything further, Your Honor.

EXAMINATION BY MR. HALL:

* * *

[36]Q Do you understand that the Judge might very well sentence you to the death penalty in this case?

A Yes, I do.

Q Do you know that by pleading guilty here today that instead of 12 people deciding, there will only be one person deciding, this Judge; do you understand that?

A Yes, I do.

Q And as to the other counts, the Judge could sentence you to the minimum, or he may very well sentence you to the maximum on each of the other counts charged; do you understand that?

A Yes.

* * *

[52]REPORTER'S CERTIFICATE

I, Carol A. Burch, Certified Court Reporter, hereby certify that I am the official court reporter for Division 4 of the Jackson County Circuit Court; that I was present and reported all the proceedings had in the case of State of Missouri, Plaintiff, v. Michael Taylor, Defendant, Case No. CR89-4934.

I further certify that the foregoing 51 pages contain a true and accurate reproduction of my shorthand notes.

_____, C.C.R.
Carol A. Burch
Certified Court Reporter

IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI
AT KANSAS CITY

Division 9
Case No. CR89-4934

STATE OF MISSOURI,

Plaintiff,

—v.—

MICHAEL TAYLOR,

Defendant.

DEFENDANT'S MOTION TO WITHDRAW
PLEA PURSUANT TO MISSOURI RULE OF
CRIMINAL PROCEDURE 29.07

COMES NOW the defendant herein, Michael Taylor, and by and through counsel of record respectfully requests this court to issue its order pursuant to Missouri Rule of Criminal Procedure 29.07 allowing the defendant to withdraw his plea of guilty previously made herein.

In support thereof, the defendant states as follows:

SUGGESTIONS IN SUPPORT OF MOTION

Inasmuch as the court has taken judicial notice of all prior proceedings in this case which has been to the Supreme Court of Missouri under Criminal Rule 29.07, and in which the Supreme Court remanded the cause without opinion for re-sentencing on the issue of life or death, defendant will not recite all of the cases cited previously by counsel in support of the issue to Motion to withdraw his plea of guilty, but reaffirms all of those cases of which the court has taken judicial notice.

Inasmuch as the Supreme Court has affirmed the plea of guilty and remanded the cause for the issue of sentencing only, and the court has taken judicial notice of all prior proceedings and pleadings and they are thus preserved for any appeals from this court to the courts of Missouri and the Federal courts, and the fact that the prosecuting attorney of Jackson County stipulated for the State of Missouri that in any appeal of this matter through the Missouri courts and the Federal court, the State of Missouri will not object to any alleged procedural defect to any prior proceedings or transcripts previously heard in this matter and they will thus be allowed to be used on any appeal in the State or Federal court, defendant will not recite all of those cases, but readopts them and reaffirms them herein as reasons for withdraw of the plea of guilty.

WHEREFORE, for all of the aforementioned reasons, the defendant respectfully requests the court to enter its order allowing the defendant to with-

draw his plea of guilty pursuant to Missouri Criminal Rule 29.07.

Respectfully submitted,

/s/ JAMES L. MCMULLIN

JAMES L. MCMULLIN #14788
1125 Grand Avenue, Suite 810
Kansas City, Missouri 64106
(816) 421-6979
FAX: (816) 421-1524

ATTORNEY FOR DEFENDANT

IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI
AT KANSAS CITY

Division 9
Case No. CR89-4934

STATE OF MISSOURI,

Plaintiff,

—v.—

MICHAEL TAYLOR,

Defendant.

DEFENDANT'S MOTION REQUESTING
JURY TRIAL ON THE ISSUE OF PUNISHMENT

COMES NOW the defendant herein by his court
appointed attorney, James L. McMullin, and respect-
fully moves the court in behalf of the defendant to

grant the defendant a jury trial on the issue of punishment in the above cause.

Respectfully submitted

/S/ JAMES L. McMULLIN
JAMES L. McMULLIN #14788
1125 Grand Avenue, Suite 810
Kansas City, Missouri 64106
(816) 421-6979
FAX: (816) 421-1524

CERTIFICATE OF NOTICE

I hereby certify that a copy of
the foregoing Motion was mailed
this 10th day of January, 1994, to:

Mr. Jeff Stigall
Asst. Prosecuting Attorney
Jackson County Courthouse
415 E. 12th Street
Kansas City, Missouri 64106

/S/ JAMES L. McMULLIN
JAMES L. McMULLIN

IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI
AT KANSAS CITY

Division 9
Case No. CR89-4934

STATE OF MISSOURI,

Plaintiff,

—v.—

MICHAEL TAYLOR,

Defendant.

SUGGESTIONS IN SUPPORT OF DEFENDANT'S
MOTION TO WITHDRAW PLEA OF GUILTY, AND
FOR JURY TRIAL OR ADVISORY JURY MADE TO
THE COURT IN THE EVENT THE WITHDRAWAL
OF THE PLEA OF GUILTY IS NOT GRANTED

Defendant has previously filed herein his Motion to Withdraw Plea in the above case after the Supreme Court affirmed the plea of guilty and remanded the case to the Circuit Court for a rehearing on the sentencing issue and to allow a jury

assess punishment if the Motion to Withdraw his plea is denied.

Defendant's attorney has not filed Suggestions in Support of said motions previously in this court as the court agreed to take judicial notice of all prior matters in the case and the State agreed not to object procedurally on any appeal to the State or Federal courts on that issue, if an appeal is needed.

Thereafter, on Monday, January 17, 1994, defendant's counsel had a conference with defendant and he requested his attorney to file a brief in support thereof, even though the court has stated in the record that it will take judicial notice of all the prior motions on the issues.

On January 18, 1994, counsel received a notice from the court that the defendant's Motions to Withdraw his defendant's plea and for a jury trial have been overruled; however, in an aid to the court, counsel hereby requests the court to reconsider the motion after reading the enclosed brief on the issue of the defendant's desire to withdraw the plea of guilty in the case.

Under Rule 29.07 (d), a defendant's Motion to Withdraw a plea of guilty may be made *before* sentence is imposed, and the Supreme Court has remanded the cause for a hearing before this court for re-sentencing. Inasmuch as that issue has not been decided by this court, the defendant, again, reaffirms all his prior allegations at the prior hearings in this matter and again urges the court to allow him to withdraw his plea of guilty in the interest of justice. *State v. Choate*, 639 S.W.2d 906 (Mo. App. 1982).

The issue was raised in *State v. Nielson*, 547 S.W.2d 153, in the Missouri Court of Appeals for the

Eastern District in which the court discussed at length the issue of the withdrawal of a plea of guilty *prior* to sentencing.

The court, in that case, stated that the final test of whether a plea could be set aside is whether or not it was made intelligently and voluntarily and with a full knowledge of the consequences. *State v. Good*, 403 S.W2d 594 and *State v. Nielson*, *supra*. See also *Tillcock State*, 711 S.W.2d 203.

Inasmuch as the United State's Supreme Court has spoken in *Boykin v. Alabama*, 395 U.S. 238 (1969) in which the Supreme Court clearly stated that to relinquish one's right to a jury trial, a defendant must be particularly advised as to *all* of his rights in a criminal case and a court must be positive that a guilty plea was made freely, voluntarily, and intelligently. the defendant's position in this case is that he did not clearly understand and was not clearly advised by his then counsel of record, or the court, of all his rights particularly that he had a right, after a plea of guilty, to request a jury trial on the issue of punishment with the consent of the prosecuting attorney and had the defendant know that he would not have entered his plea of guilty hereto.

The defendant in this case contends that his plea was not voluntarily and intelligently made in this case because his then counsel failed to advise him of the rights under Section 565.006.2 R.S.Mo. and the reputation of the trial judge for being impaired by drinking alcohol and that the prosecutor's office of Jackson County, Missouri, engaged in a continual practice of racial discrimination against Negroes. Further, defendant's counsel at the time did not advise him as to all of his rights including his right

of confrontation and cross examination of the State's witnesses.

In *Tollett v. Henderson*, 411 U.S. 258, the United States Supreme Court held that the defendant's attorneys did not have sufficient competency in a criminal case to advise the client the plea could be withdrawn. In this case, the record is clear that the defendant's counsel did not properly advise him of all his rights as above stated.

Again, in *MacMann v. Richardson*, 397 U.S. 759, the U.S. Supreme Court held that the law favors a trial on the merits. Therefore, in this case, defendant should be allowed to withdraw his plea of guilty and re-enter his plea of not guilty.

The defendant, Taylor, in this case was not advised that he had a right to question the jurors or that he could present facts in mitigation. *State v. Nielson*, 546 S.W.2d 160, and a failure to advise him voids his guilty plea.

The defendant has a right to Due Process, effective assistance of counsel, and a right to avoid cruel and unusual punishment guaranteed under both the State and Federal Constitutions and to deny him to withdraw his plea of guilty is unfair, unjust, and denies him equal justice under the law. *Witherspoon v. Illinois*, 391 U.S. 510 and also *Morgan v. Illinois*, 112 Sup.Crt. 2222.

The Missouri Supreme Court, as held in *State v. Bibb*, 702 S.W.2d 462 (Mo. Sup. Crt. in banc 1985) and Rule 27.01(b) demands that a waiver of a jury and consent of the court to allow a guilty plea must appear unmistakably on the record. In this case, a review of the transcript of the guilty plea proceedings indicates that was not done in this instance.

The foregoing violations of the defendant's constitutional rights violate his rights under the fifth, Sixth, and fourteenth Amendments to the United States Constitution and the Missouri Constitution.

The defendant re-asserts his arguments made in the previous hearings as to all of the defendant's motions as to the right to withdraw his plea of guilty, incompetency of counsel, intoxication of the trial judge, and racial discrimination and urges the court when taking judicial notice thereof to re-read carefully the transcript concerning those issues previously introduced and made a part of this record.

The defendant contends and states to the court that he was subjected by his counsel then of record to insufficient advice as to his rights before he entered his plea of guilty. He would not have entered a plea of guilty had he known he had been waiving his Fifth, Sixth, and Fourteenth Amendment rights and his constitutional rights under Article I, Section 18, (a) 1921 of the Missouri Constitution.

It is defendant's contention that the above errors constitute a manifest miscarriage of justice if allowed to stand as the defendant was not properly advised of his rights by counsel and did not properly, freely, and voluntarily, enter a plea of guilty for the reasons stated herein.

THE CHANGED POSTURE OF THE CASE AFTER REMAND

Further, the Motion to Withdraw his plea of guilt originally was made *after* the sentence of death was imposed by the trial court and it was denied by the trial court.

Now, the Supreme Court has affirmed the plea of guilty by the defendant, set aside the death sentence, and remanded the cause, without opinion, to this court for re-sentencing on the issue of life or death.

The other issues raised were issues made by the defendant of racial discrimination by the prosecutor of Jackson County and the incompetency of the judge. These issues were not addressed in an opinion by the Supreme Court of Missouri upon remand by the court for re-sentencing and are preserved by this court taking judicial notice thereof.

A request was made subsequently by the parties herein for a written opinion on these issues by the Supreme Court of Missouri which was denied by the court.

The posture of the case now stands as follows:

- 1) The defendant's plea of Murder, First Degree, was affirmed,

- 2) The cause was remanded for resentencing on the issue of life or death. Thus, the Supreme Court *set aside* the sentence of death and the defendant is awaiting sentence by this court.

The issue before the court now is whether or not at the time the defendant pled guilty to Murder, First Degree, he knowingly and intelligently waived his Constitutional Rights including the right to a jury to assess punishment; eg: whether or not he was informed by counsel or by the sentencing court that he had a right, upon the plea of guilty, to have a jury determine his sentence, if the State agreed, under Missouri law before he entered his plea of guilty.

There is a plethora of evidence before this court from the previous hearings in the case of which this

court has taken judicial notice establishing that the defendant was *not* advised of his right to have a jury assess his punishment with the consent of the State, if he entered a plea of guilty.

Also, the attempt to withdraw his plea of guilty was originally made by the defendant *after* his sentence of death was pronounced by the trial court.

Now the posture of the case has changed: the Missouri Supreme Court has set aside the previous sentence of death and remanded the case for re-sentencing.

The defendant now seeks to withdraw his plea of guilty *before* sentencing and since he was not advised of his Constitutional Rights to have a jury to determine his sentence upon a plea of guilty, the defendant did not and could not have intelligently waived his rights thereto and he must be allowed to withdraw his plea of guilty. *Boykin v. Alabama*, 395 U.S. 238 (1969), *State v. Bibbs*, 702 S.W.2d 462. In *Bibbs*, the defendant pled guilty to Murder, First Degree, and was not informed of his right to have a jury assess his punishment, and the cause was remanded by the Supreme Court.

Thus it is clear that the Missouri Supreme Court, by setting aside the death sentence and by their remanding the case for re-sentencing, that the court intended the defendant be allowed to have a jury assess his punishment.

Why else was the death sentence set aside by the Supreme Court?

Since the Supreme Court held that the plea was properly made, and affirmed it, and that the trial judge was competent at the time of the sentencing:

Why else was the sentence set aside when the court held that the sentence was properly made by a competent judge?

The answer is clear:

It was remanded for re-sentencing by a jury. There is no other logical reason to set aside a plea of guilty, freely, voluntarily, and intelligently made by a defendant before a competent judge and, under *Bibbs*, supra, the defendant is entitled to withdraw his plea of guilty.

WHEREFORE, for the foregoing reasons, defendant respectfully requests the court to set aside the defendant's previous plea of guilty made herein, and re-instate his plea of not guilty, and, in the event the court denies the defendant to withdraw his plea of guilty, that he be allowed to exercise his right to be sentenced by a jury.

Respectfully submitted,

/S/ JAMES L. McMULLIN

JAMES L. McMULLIN #14788

1125 Grand Avenue, Suite. 810

Kansas City, Missouri 64106

(816) 421-6979

FAX: (816) 421-152

ATTORNEY FOR DEFENDANT

IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI
AT KANSAS CITY

Division 9
Case No. CR89-4934

STATE OF MISSOURI,

Plaintiff,

—v.—

MICHAEL TAYLOR,

Defendant.

DEFENDANT'S MOTION FOR RECONSIDERATION
OF ITS FORMER RULING DENYING DEFENDANT
RIGHT TO WITHDRAW HIS PLEA OF GUILTY AND
TO ENTER PLEA OF NOT GUILTY

COMES NOW the defendant, Michael Taylor, by his court appointed attorney, James L. McMullin, and respectfully requests this honorable court to reconsider its former order denying defendant's request to withdraw his plea of guilty or, in the alternative, allow the defendant in this case to have a jury set

the punishment on re-sentencing in accordance with section 565.035.5 (3) R.S.Mo.

SUGGESTIONS IN SUPPORT

1) The defendant has previously filed his motion herein to be allowed to withdraw his plea of guilty previously entered herein, and to enter a plea of not guilty in the case in view of the fact that the Supreme Court of Missouri, on review of this case, vacated the judgment of this case and remanded the case for re-sentencing.

2) That the record of the 29.15 motion heard by the Supreme Court of Missouri in this case clearly revealed, and Judge Randall the sentencing judge and Judge Dieker who heard the 29.15 motion, found that the defendant's prior counsel did not advise him of his right on a plea of guilty to capital murder that he was entitled to have a jury set the punishment if the State so agreed. The State has not agreed to do so in this case.

3) That defendant herein incorporates by reference all matters and things contained in his motion to withdraw plea as for reconsideration of the same and respectfully requests this court to grant defendant's motion to withdraw his guilty plea pursuant to Rule 29.07 of the Supreme Court of Missouri.

SUGGESTIONS IN SUPPORT OF MOTION

Defendant is entitled to withdraw his plea of guilty for the reason that the previous sentence of death of the court; the sentence of 10 years on Armed Criminal Action; the sentence of 15 years on

Kidnapping; and the sentence of life on the rape charge; all said judgments have been vacated by the Supreme Court on remand to this court.

That the defendant is entitled to withdraw his plea for the reason that, under *State v. Bibb*, 702 S.W.2d 462, waiver of a jury trial by an accused and an assessment of the court must appear from the record with unmistakable clarity under the Constitution and Section 27.01(b) V.A.M.R. and the Missouri Constitution, Article I, Section 22(a).

In this case, the record does not show that the defendant's waiver of a jury trial at the time of his plea by the defendant and the assent of the court at the punishment state of this capital murder case was made with unmistakable clarity as required under the above rules in that the sentencing judge, Judge Randall, and Judge Dieker, who heard the 29.15 motion, found, and the testimony of his prior counsel, Ms. Delk, and Mr. McClain revealed they did not advise the defendant that he had a right to have a jury assess the punishment upon a plea of guilty in a capital murder case. Therefore, defendant is entitled to withdraw his plea of guilty; particularly in view of the fact that the judgment was set aside.

Also, under *Boykin v. Alabama*, 395 U.S. 238; 23 L.Ed.2d 274; 89 Sup.Ct. 1709, the defendant was denied Due Process under the Fourteenth Amendment to the U.S. Constitution where the record did not disclose that the defendant voluntarily and understandingly enter such plea in view of the fact that he was not fully advised of his rights by his prior counsel without knowledge that he was entitled to a jury to set the punishment, with the consent of the prosecutor, he could not intelligently waive his rights.

Further, defendant is entitled to withdraw his plea of guilty under Missouri Revised Statute 565.035 in which the Supreme Court is to review all death sentences. Section 565.035.5 states as follows:

The Supreme Court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the Supreme Court, with regard to death sentences shall be authorized to:

- 1) Affirm the death sentence; or
- 2) Set the sentence aside and re-sentence the defendant to life imprisonment without eligibility for probation, parole, or release except by act of the governor, or
- 3) Set the sentence aside and remand the case for re-trial of the punishment hearing. *A. new jury shall be selected or a jury may be waived by agreement of both parties* and then the punishment trial shall proceed in accordance with this chapter, with the exception that the evidence of the guilty verdict shall be admissible in the new trial together with the official transcript of any testimony and evidence properly admitted in each stage of the original trial where relevant to determine the punishment.

Under the Supreme Court's order of June 29, 1993, vacating the previous sentences and remanding the cause to the court for re-sentencing, the defendant, under the above statute, is allowed a jury to determine the sentence in this cause by law.

Defendant requests an early ruling by the court on this matter without hearing as the re-sentencing

hearing is now set for May 2, 1994, at 9 a.m. in Division 9, and the defendant believes it necessary if the motion is overruled to seek relief by extraordinary writ in the appellate courts, and does not wish to delay the hearing on May 2, 1994.

WHEREFORE, for the foregoing reasons, the defendant respectfully requests the court to either issue its new order allowing defendant to withdraw his plea of guilty in the cause in accordance with the above statute or, in the alternative, to allow the defendant to have a jury determine his sentence consistent with 565.035.5 (3) and for such other and further relief as to the court seems just and proper.

Respectfully submitted,

/s/ JAMES L. MCMULLIN
JAMES L. MCMULLIN #414788
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Kansas City, Missouri 64106
(816) 421-6979
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ATTORNEYS FOR DEFENDANT

IN THE SUPREME COURT OF MISSOURI

Case No. _____

STATE OF MISSOURI, ex rel.,
MICHAEL TAYLOR,

Relator,

—v.—

HONORABLE H. MICHAEL COBURN
Circuit Judge, Division 9
Sixteenth Judicial Circuit
Jackson County Courthouse
415 E. 12th Street
Kansas City, Missouri 64106,

Respondent.

PETITION FOR WRIT OF PROHIBITION

TO: MISSOURI COURT OF APPEALS
WESTERN DISTRICT AT
KANSAS CITY, MISSOURI

COMES NOW the relator herein, Michael Taylor, by his court appointed attorney of record, and in accordance with Supreme Court Rule 97, and petitions the court and states as follows:

1) That the defendant/relator is indigent, so declared by the Circuit Court of the Sixteenth Judicial Circuit of Missouri, and is now incarcerated in the Jackson County Department of Corrections at 1300 Cherry, Kansas City, Jackson County, Missouri.

2) That the defendant has been previously charged by Grand Jury indictment from Jackson County, Missouri, with the crimes of: Count I, Capital Murder; Count III, Armed Criminal Action; Count II, Kidnapping; County IV, Rape.

3) That on the 8th day of February, 1991, the defendant pled guilty to said crimes: Count I, Capital Murder; Count II, Armed Criminal Action; Count III, Kidnapping, and, Count IV, Rape.

4) The defendant pled guilty without a plea bargain to said charges and received the following sentences: Count I, Death; Count II, 10 years; Count III, 15 years; Count IV, life; all sentences to run consecutively.

5) The plea and sentencing were before Judge Alvin C. Randall of Division 4 of the Sixteenth Judicial Circuit of Missouri.

6) Thereafter, the defendant filed a Motion to Withdraw his plea which was denied, and the defendant filed a motion under Supreme Court Rule 24.035 alleging various Constitutional violations including: (1) ineffective assistance of counsel, particularly alleging the trial counsel did not fully advise him that he was entitled to have a jury assess the punishment with the consent of the prosecutor upon the plea of guilty to capital murder; (2) that the Prosecuting Attorney's Office of Jackson County, Missouri, was racially prejudice against blacks in

that in the history of Jackson County, since 1820, only three times has the prosecutor's office refused to waive a death penalty where a defendant agreed to plead to Capital Murder and receive a sentence of life without probation or parole. Those cases being the defendant, his co-counsel in the case, and one other case. The victim in this case is Caucasian. (3) That the sentencing judge was incompetent because he had been drinking on the day of the sentence of death.

7) That after said motion was filed, all of the judges of the Sixteenth Judicial Circuit secluded themselves on October 28, 1991, because they were associates of the sentencing judge in Division 4. See Exhibit 1 attached.

8) The Supreme Court then assigned Judge Robert H. Dierker, Jr., Circuit Judge of St. Louis, Missouri, to hear the 24.035 motion. See Exhibit 2 attached.

9) Judge Dierker, Jr. heard the motion and, after an extensive hearing on the issues, affirmed the findings of the sentencing judge in Division 4, including the death sentence on July 1, 1992.

10) The matter was then timely appealed to the Supreme court of Missouri and the Supreme Court, without opinion, vacated the judgment and remanded the case for reimposition of sentence, but did not rule upon defendant's appeal from Judge Dierker.

11) Thereafter, the Attorney General of Missouri, filed a motion for a written opinion in the case to clarify its order of remand.

12) That, thereafter, the Supreme Court denied said motion without comment.

13) On remand to the Circuit Court of the Sixteenth Judicial Circuit, by the Supreme Court by its order of June 29, 1993, (See Exhibit 3) the matter was assigned to Division 9, the Honorable H. Michael Coburn, presiding, and the defendant filed a Motion to Withdraw his Plea of Guilty in view of the fact that this court had vacated the judgment, or in the alternative, to grant his request for a jury to assess punishment which motion was overruled by Division 9.

14) That in vacating said judgment, this court vacated the guilty plea and Division 9 now has no jurisdiction or authority to re-sentence the defendant, and the defendant is entitled to re-enter his plea of not guilty and have a jury trial on the merits, or in the alternative, to have a jury assess his punishment on the guilty plea.

15) That Division 9 of the Sixteenth Judicial Circuit has set a re-sentencing hearing on the previous guilty plea for the 2nd day of May, 1994, at 9 a.m.

16) That defendant moved to have a jury assess his punishment if the court refused to allow him to withdraw his plea, but under Section 565.006.2 R.S.Mo. the prosecuting attorney of Jackson County, Missouri, has refused to consent to allow a jury to assess the punishment and Division 9 has refused defendant's request for a jury to assess the punishment or to withdraw his plea.

17) That the action of Division 9 in refusing to allow the defendant to re-enter his plea of not guilty in view of this court's vacating the judgment previously entered by Division 4, and setting the cause for a new hearing on the merits, or for re-sentencing

before a jury, is a denial of defendant's Constitutional Rights to a jury trial under the Missouri and U.S. Constitutions.

18) That said threatened acts by Division 9 is a violation of the defendant's Constitutional Rights to Due Process of Law under the Fourteenth Amendment to the United States Constitution.

19) On March 31, 1994, a conference was held in Division 8 of the Sixteenth Judicial Circuit in which present were the Presiding Judge, Judge Lee Wells, of Division 8; Judge John O'Malley of Division 6, who is assigned the Nunley case, the co-defendant; and Judge Michael Coburn, Division 9; also present were Mr. Charles Atwell who represents the co-defendant, Robert Nunley, and James McMullin who represents the defendant, Taylor.

20) That at said hearing the courts were advised that the order of Judge Edward D. Robertson, Jr., the then Chief Justice of the Supreme Court, in his order of November 22, 1991, after all of the judges of the Sixteenth Judicial Circuit had disqualified, without qualification, themselves by Judge Mason's order of October 28, 1991, assigned the Honorable Robert H. Dierker, Jr., the jurisdiction in both cases, the order reads as follows:

"It is further ordered that the judge hereby transferred shall have the same powers and responsibilities as a judge of the court or district to which transferred. Such powers and responsibility shall be confined to the designated matters and cases, *and shall continue until final disposition of such designated matters including after trial proceedings.*" Exhibit 2.

21) That a telephone conference was held between the parties and Justice Robertson and Judge O'Malley read to Judge Robertson the above order and Judge Robertson stated in unequivocal language that that order was the Supreme Court's standard boiler plate order and that the jurisdiction in the matter obviously was with Judge Dierker until final disposition.

22) That thereafter, Division 9 agreed to disqualify himself in view of the order and comments of Judge Robertson.

23) That on April 1, 1994, counsel McMullin received a fax from Judge E. Richard Weber of the First Judicial Circuit, a copy of which is attached herewith and made a part hereof, stating he had been assigned to hear the case and would be in Division 8 of the Circuit Court of Jackson county at 3:30 p.m. on Monday, April 4, 1994, for pre-trial conference and to hear matters already scheduled for that time. Exhibit 3.

24) That on Monday, April 4, 1994, a hearing was held in the Circuit Court of Jackson County, Missouri, at 1315 Locust, Kansas City, Missouri, in which counsel for both defendants and their clients were present and Judge O'Malley and Judge Coburn took the bench and stated that they had changed their minds and intended to have the Supreme Court rescind the order appointing Judge Weber to hear the causes, and they intended to continue to hear the respective cases.

25) Counsel for the defendants then again challenged the jurisdiction for the reason that, under the order of Judge Donald Mason, Acting Presiding

Judge of October 28, 1991, all of the judges of the Sixteenth Judicial Circuit had secluded themselves without qualification from these two cases and the order of November 22, 1991, from Justice Robertson, Chief Justice of the Supreme Court, gave jurisdiction in both cases to Judge Dierker until final disposition.

26) That because of those two orders, all of the judges of the Sixteenth Judicial Circuit, having secluded themselves without qualification, cannot "unreclude" themselves and hear the matter.

All of the issues that were heard by Judge Dierker in the defendant's 24.035 Motion, including the alleged drinking of the sentencing judge, the racial discrimination of the prosecutor, and all of the other issues have been previously agreed to by the prosecutor and Division 9 that those issues were still in the case, and all of those issues, although defense would not be allowed to re-argue them, that the court would take judicial notice of all of those issues and preserve them for appeals, and the State agreed that they would not object procedurally to those issues on appeal in either State or Federal court.

28) That Division 9 of the Sixteenth Judicial Circuit has now set this matter for re-sentencing on May 2, 1994.

28) That the action of Division 9 in refusing to allow the defendant to reenter his plea of not guilty in view of this court's vacating the judgment previously entered by Division 4 and setting the cause for a new hearing on the merits or for re-sentencing before a jury, is a denial of the defendant's Consti-

tutional rights to a jury trial under the Missouri and United States Constitutions.

29) That the threatened acts of Division 9 is in violation of the defendant's Constitution rights to Due Process of law under the Fourteenth Amendment to the United States constitution.

30) Division 9, in view of the fact that all of the judges of the Sixteenth Judicial Circuits have been reclused in this matter and this court's appointing Judge Dierker to hear the case through finally disposition giving him exclusive jurisdiction, leaves Division 9 without jurisdiction to hear the matter.

31) That relator has no speedy or other adequate remedy at law, or by appeal or otherwise, to the threatened acts of Division 9, and unless this court issues its order forbidding the same, Division 9 will proceed with said sentencing without jurisdiction.

32) That no other, or higher, court has refused a Writ of Prohibition in this case.

33) That the Missouri Court of Appeals, Western District, has denied said writ.

WHEREFORE, defendant prays this court to issue its Writ of Prohibition, the Honorable H. Michael Coburn, Circuit Judge, Division 9, Sixteenth Judicial Circuit, to desist from any further action in the matter until the further order of the court.

120a

Respectfully submitted,

/s/ JAMES L. McMULLIN

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Louis Caskey #32597

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ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that a copy
of the foregoing notice was
delivered/faxed this

11th day of April, 1994, to:

121a

IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI
AT KANSAS CITY

CASE NO. CR89-4934
DIVISION 9

STATE OF MISSOURI

—VS.—

MICHAEL TAYLOR

FINDINGS, JUDGMENT AND SENTENCE

Now on this 17th day of June, 1994, the State appears by its attorneys, Jeff Stigall, C. J. Rieg and Andy Russell. The defendant Michael Taylor appears in person and by his attorneys, James McMullin, Louis Caskey and C. John Pleban.

The defendant appeared in Division Four of this Court on February 8, 1991, and entered pleas of guilty to the charges in Count I, Murder in the First Degree, Count II, Armed Criminal Action, Count III, Kidnapping, and Count IV, Rape. The Court accepted those pleas of guilty and found the defendant guilty of each of those offenses beyond a reasonable doubt.

The defendant appeared before this Court in person and by counsel from May 2, 1994 through May 5, 1994, and then again on May 12, 1994 and June 6, 1994, where evidence was presented by the State with regard to certain alleged statutory and non-statutory aggravating circumstances in support of the death penalty as to Count I and wherein defendant's counsel presented evidence in support of certain alleged statutory and non-statutory mitigating circumstances in support of a sentence of life without parole as to Count I.

On this 17th day of June, 1994, the defendant is given allocution and the Court, having read the transcript of defendant's pleas of guilty, having heard the evidence presented and the arguments of counsel from the May 2, 1994 through May 5, 1994, the May 12, 1994, and the June 6, 1994 hearings, and having read and examined the exhibits offered and admitted into evidence by each party in those evidentiary hearings, makes the following findings beyond a reasonable doubt, based solely on the guilty pleas, this evidence and these arguments

I. Murder in the First Degree - Statutory Aggravators

The Court finds the following aggravating circumstances exist in this case, pursuant to Section 565.032, RSMo.:

- A. The Murder in the First Degree of Ann Harrison by the defendant was outrageously and wantonly vile, horrible, and inhuman in that it involved torture and depravity of mind. Ann Harrison was forced into a stranger's car from the end of her driveway

as she awaited her school bus and was taken to another location where she was blindfolded, bound, and raped by the defendant. Later, as she lay helplessly pleading for her life in the trunk of a stolen car, Ann Harrison was stabbed repeatedly by defendant. The evidence showed that Ann Harrison did not die immediately, but rather bled to death some minutes after being stabbed. By such acts, the defendant exhibited a callous disregard for the sanctity of all human life.

- B. The Murder in the First Degree of Ann Harrison was committed by the defendant who at that time had an active warrant for his arrest as an absconder from the Missouri parole system due to his escape from the Fellowship Halfway House, a place of lawful confinement.
- C. The murder of Ann Harrison by the defendant was committed while defendant was engaged in the perpetration of attempted robbery, since the stated original intent was to steal Ann Harrison's purse.
- D. The murder of Ann Harrison by the defendant was committed while defendant was engaged in the perpetration of kidnapping.
- E. The murder of Ann Harrison by the defendant was committed while defendant was engaged in the perpetration of rape.
- F. Ann Harrison was a witness to the pending investigation of her kidnapping and was killed as a result of her status as a witness

thereto. The investigation began only moments after she was kidnapped, when her school bus arrived and it was discovered that she was missing.

II. Murder in the First Degree – Non-Statutory Aggravators

- A. Defendant has prior felony convictions from Jackson County, Missouri in CR84-2088 for Burglary in the Second Degree, CR84-2089, Burglary in the Second Degree, CR84-2231 for Burglary in the Second Degree, CR84-2232 for Burglary in the Second Degree, CR84-2233 for Burglary in the Second Degree, CR84-2856 for Burglary in the First Degree, and CR84-3589 for Tampering in the First Degree. Defendant's criminal history indicates a pattern of increasingly serious criminal behavior.
- B. Defendant escaped from the custody of the Jackson County Department of Corrections by stealing a pair of wire cutters from a maintenance cart, concealing them in his hollowed out shoe sole for three months, then when the opportunity presented itself, he cut his leg shackles and ran from corrections officers. Shortly thereafter, defendant was apprehended by Kansas City Police. Defendant then threatened the Jackson County Corrections Officer in charge of returning him to the jail.
- C. Defendant inflicted inconceivable physical torture and emotional suffering upon Ann

Harrison. Ann Harrison was raped and there was evidence of vaginal injuries and bleeding. Ann Harrison's hands were bound, leaving evidence of a struggle by her injuries from the ligature marks. Ann Harrison was deceived into thinking that her parents could provide a ransom for her release and tricked into entering the trunk of the stolen car where she was murdered.

III. Mitigating Circumstances

A. The Court finds the following mitigating circumstances:

- 1) At the time of the murder of Ann Harrison, the defendant was under the influence of drugs to some degree.

B. In considering the relevant statutory mitigating circumstances listed in Section 565.032.3 RSMo, the Court specifically finds the following:

- 1) At the time of the Murder in the First Degree of Ann Harrison, the defendant was not under the influence of extreme mental or emotional disturbance;
- 2) The defendant was not merely an accomplice in the Murder in the First Degree of Ann Harrison and the defendant's participation was not relatively minor;
- 3) The defendant did not act under duress or under the substantial domination of another person;

- 4) The capacity of the defendant to appreciate the criminality of his conduct and to conform his conduct to the requirements of law was not impaired and the defendant is not mentally retarded;

IV. Appropriate Punishment for Murder in the First Degree

- A) The Court finds that the mitigating circumstances in this case do not outweigh the aggravating circumstances and that the aggravating circumstances are such as to warrant the imposition of death as punishment of this defendant.
- B) In making such a finding the Court realizes that a Court is never compelled to fix death as the punishment even though the Court did not find the evidence of one or more mitigating circumstances sufficient to outweigh the aggravating circumstances found to exist.

V. JUDGMENT AND SENTENCE

As to Count I, it is adjudged that the defendant has been found guilty on his plea of guilty to the offense of Murder in the First Degree, a class A Felony. It is adjudged that defendant is hereby sentenced to suffer the punishment of death by lethal injection, or such other means as prescribed by the laws of Missouri.

As to Count II, it is adjudged that defendant has been found guilty on his plea of guilty of the offense

of Armed Criminal Action, a Class A Felony. It is adjudged that defendant is hereby sentenced and committed to the custody of the Missouri Division of Adult Institutions for imprisonment for fifty (50) years, said sentence to run consecutively to the sentence imposed in Count I.

As to Count III, it is adjudged that defendant has been found guilty of the offense of Kidnapping, a Class B Felony. It is adjudged that defendant is hereby sentenced and committed to the Missouri Division of Adult Institutions for imprisonment for a period of fifteen (15) years, said sentence to run consecutively to the sentences imposed in Count I and Count II.

As to Count IV, it is adjudged that defendant has been found guilty of the offense of Rape, a Class A Felony. It is adjudged that defendant is hereby sentenced and committed to the Missouri Division of Adult Institutions for imprisonment for life, said sentence to run consecutively to the sentences imposed in Count I, Count II, and Count III.

The Court finds no probable cause to believe that defendant's counsel was ineffective.

Judgment is hereby entered in favor of the State of Missouri and against defendant for the sum of \$68.00 for the Crime Victims Compensation Fund.

IT IS HEREBY ORDERED that the Court Administrator deliver a certified copy of this Judgment and Commitment to the Jackson County Department of Corrections and that the copy serve as the commitment of defendant.

Defendant is hereby remanded to the custody of the Director of the Jackson County Department of Corrections for delivery to representatives of the State of Missouri penal system.

Defendant is to be delivered to the Correctional Facility in Potosi, Missouri.

6-17-94
Date

/s/ H. MICHAEL COBURN
H. MICHAEL COBURN, Judge

CERTIFIED COPY

I certify that the foregoing document is a full, true and complete copy of the original on file in my office and of which I am legal custodian.

Austin E. Van Buskirk
Court Administrator

Circuit Court of Jackson County, Missouri

10/3/94
Date

By [ILLEGIBLE]
Deputy

IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI
AT KANSAS CITY

CV94-19962
DIVISION 12

MICHAEL TAYLOR,

Movant,

—VS.—

STATE OF MISSOURI,

Respondent.

The Movant having filed his motion for post-conviction relief pursuant to Missouri Supreme Court Rule 24.035, the matter came before the Court for hearing on May 17 and May 18, 1995. The Movant appeared in person and by counsel, Elizabeth Unger Carlyle. The State appeared by Assistant Prosecuting Attorneys, Jeff Stigall and C. J. Rieg.

Evidence was presented. The Court now enters the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

1. Movant, Michael Taylor, was charged in CR89-4934 by the State of Missouri with four felony counts in the Sixteenth Judicial Circuit, Jackson County, Missouri, as follows:

Count I: Murder in the First Degree, a Class A felony,

Count II: Armed Criminal Action, a Class A felony,

Count III: Kidnapping, a Class B felony, and

Count IV: Rape, a Class A felony.

2. On February 8, 1991, a hearing was conducted in CR89-4934 before the Honorable Alvin C. Randall, Judge of Division 4 of the 16th Judicial Circuit at Kansas City, during which Movant pled guilty to all four counts as charged.

3. From April 23 through April 25, 1991, evidence was presented by the State and by Movant to Judge Randall pursuant to §565.030.4, R.S.Mo. Cum.Supp.1984, regarding the appropriate punishment to be assessed and declared.

4. On May 3, 1991, Judge Randall sentenced Movant on all four counts. As to Count I, Defendant was sentenced to death; as to Count II, Movant was sentenced to 10 years in the Missouri Department of Corrections, said sentence to run consecutively to Count I; as to Count III, Movant was sentenced to 15 years in the Missouri Department of Corrections, said sentence to run consecutively to the sentences

imposed in Counts I and II; and as to Count IV, Movant was sentenced to life imprisonment in the Missouri Department of Corrections, said sentence to run consecutively to Counts I, II, and III.

5. On August 9, 1991, Movant timely filed a Pro Se Motion to Vacate, Set Aside or Correct the Judgment or Sentence. The matter was filed in the Sixteenth Judicial Circuit, and was designated as CV91-20562. The relevant dates and events subsequent to the filing of said motion are listed hereafter.

On September 3, 1991, Judge Randall recused himself in the post-conviction action. On October 15, 1991, Movant filed an Amended Motion to Vacate, Set Aside or Correct Judgment and Sentence. On October 25, 1991, the State filed its response. On October 28, 1991, by order of the Acting Presiding Judge, Donald Mason, all of the judges of the Sixteenth Circuit were recused from hearing CV91-20562. The matter was then referred to the Missouri supreme court.

On November 22, 1991, the Missouri Supreme Court designated the Honorable Robert H. Dierker, Jr., as special judge to hear Movant's post-conviction relief motion.

6. From March 23 to March 26, 1992, Judge Dierker heard evidence on the Movant's post-conviction motion. The record remained open until June 1, 1992, allowing Movant additional time to adduce evidence on the issue of racial discrimination in the application of the death penalty. The State filed a brief in opposition to Movant's motion for post-conviction relief.

7. On July 1, 1992, Judge Dierker, ". . .[O]rdered, adjudged and decreed that the motion of Michael

Taylor for relief under Rule 24.035 be and the same is hereby denied and dismissed with prejudice, and the judgment and conviction and sentence, including the sentence of death, in 16th Cir. No. CR89-4934, shall stand in full force and effect, and the death warrant heretofore entered shall be executed as prescribed by law."

8. On January 13, 1993, Movant filed an appeal from his sentence of death and from the denial of his Rule 24.035 motion to the Supreme Court of Missouri. The Attorney General's Office responded on behalf of the State.

9. On June 29, 1993, the Supreme Court of Missouri issued its order remanding the cause for resentencing, stating, "Judgment vacated. Cause remanded for new penalty hearing, imposition of sentence, and entry of new judgment".

10. The matter was assigned within the circuit to the Honorable H. Michael Coburn, Division 9 of the Sixteenth Judicial Circuit by order of the acting presiding judge.

11. On January 6, May 2 through May 4, May 12, and June 6, 1994, evidence was presented by the State and by Movant to Judge Coburn pursuant to §565.030.4 R.S.Mo. Cum.Supp.1984, regarding the appropriate punishment to be assessed and declared.

12. On June 17, 1994, Judge Coburn sentenced Movant on all four counts. As to Count I, Judge Coburn imposed the death sentence; as to Count II, Judge Coburn sentenced Movant to fifty (50) years in the Missouri Department of Corrections, said sentence to run consecutively to Count I; as to Count

III, Judge Coburn sentenced Movant to fifteen (15) years in the Missouri Department of Corrections, said sentence to run consecutively to the sentences imposed in Counts I and II; and as to Count IV, Judge Coburn sentenced Movant to life imprisonment in the Missouri Department of Corrections, said sentence to run consecutively to Counts I, II, and III.

13. On October 3, 1994, Movant filed his subsequent Pro Se Motion to Vacate, Set Aside or Correct the Judgment or Sentence. That motion was designated CV94-19962, and is the action presently before the Court. On December 27, 1994, Movant filed an Amended Motion to Vacate, Set Aside or Correct Judgment and Sentence. Additionally, the Movant filed a Motion for Change or Disqualification of Judge Coburn on that date. After having been granted an extension of time, the State filed its response on February 6, 1995 to Movant's Motion to Vacate.

14. Judge H. Michael Coburn died during the latter part of December, 1994. The matter was then assigned to Division 12 of the Jackson County Circuit Court by order of the Presiding Judge, dated February 16, 1995.

15. Division 12 came off special assignment the first Monday of March, 1995. On March 2, the Court entered an order setting the matter for hearing on March 21, 1995. On March 11, a Motion for Continuance was filed on behalf of the Movant. By order dated April 3, 1995, the Court granted said request, set a pretial [sic] hearing for April 17, and rescheduled the hearing date for April 24, 1995.

On April 13, 1995, Movant filed Supplemental Suggestions in Support of Motion to Recuse the entire 16th circuit.

On April 17, 1995, Movant filed another Motion for Continuance, said Motion having been filed in open Court. By written order, dated April 17, 1995, the Court granted Movant's request, reset the hearing for May 18, 1995, and denied Movant's Motion for Change or Disqualification of Judge.

16. On May 18 and May 19 a post conviction hearing was conducted before Division 12. At the hearing, Movant was represented by Elizabeth Unger Carlyle, and the State of Missouri was represented by Jeff Stigall and C. J. Rieg, Assistant Jackson County Prosecutors.

Evidence was presented in support of the Movant's motion. The State called no witnesses.

At the time of the hearing, the Movant presented a number of witnesses. Those witnesses included the following individuals: Movant's mother, Linda Taylor; Movant's sister, Wanjalette Brown; Movant's cousin, Norman Taylor; Movant's aunt, JoAnn Taylor; Movant's sister, Donna Sue Taylor; Pat Bartholome, a "mitigation investigator"; C. John Pleban, one of Movant's attorneys for the second sentencing procedure; Martin McClain, one of the attorneys representing Movant at the original proceedings before Judge Randall; Beverly Taylor, mitigating circumstances investigator; Richard Sindel, an attorney familiar with the acceptable standard of performance for attorneys in capital cases; Michael Owsley, an inmate in the Missouri Division of Adult Institutions, who is presently under a sentence of death, and who was represented by James McMullin; JoLinda Johnson, the mother of Michael Owsley;

Dr. James Straub, a psychologist who reviewed the psychological reports on Movant, and interviewed him; and finally, Tina Butler, a childhood acquaintance of Movant.

Movant's mother testified that she had several contacts with Mr. McMullin, John Pleban and Lou Caskey, her son's attorneys for the second penalty hearing. She also stated that she had contact with Ms. Pat Bartholome, the mitigation investigator for Mr. McMullin.

Mrs. Taylor testified that when she had her first contact with Mr. McMullin, he had confused the facts of her son's case with those of another client. However, the witness further testified that after the first rather confused conference with Mr. McMullin, he never confused the facts of her son's case again in a conversation with her.

Mrs. Taylor further testified about various incidents in the Movant's life as a child: including Movant's father shooting himself; Movant's finding of the body of a dead child; and, Movant's uncle's accidental death.

Further, the witness testified that she had testified at both the first and second penalty hearings on behalf of her son. In fact, the witness testified that she had spoken about some of these incidents in the second penalty hearing in front of Judge Coburn.

Mrs. Taylor also testified that at the prior sentencing hearing, she had spoken about the fact that Movant had attended church, and had had a normal childhood.

The second witness called by the Movant, was his sister Wanjulette Brown. She testified regarding her contact with Ms. Delk, Movant's attorney at the original proceedings before Judge Randall. Since the

issue of Ms. Delk's services as counsel to Movant have already been litigated, the Court will not relate here Ms. Brown's testimony on that issue.

Ms. Brown further testified that she had met with Mr. McMillin once in the company of her family. She also testified that before she met with Mr. McMullin, she had spoken to Ms. Bartholome, who had been asked by Mr. McMullin to conduct interviews for the purpose of writing a social history of Movant. Mr. McMullin called Mrs. Brown as a witness in the second sentencing hearing before Judge Coburn.

Movant called his cousin, Norman Taylor, as his third witness at the post conviction hearing. To distinguish the witness from the Movant, I will hereinafter refer to him as "Norman".

Norman testified that he was close to the Movant, and that Movant sometimes stayed overnight with him. The witness stated that once Movant had awakened and drew a picture of Satan on the wall.

The witness spoke about the incident in which Movant had found the body of a dead child. Norman testified that the Movant was shaken by that incident. Norman also testified that Mr. Taylor had trouble with drugs and alcohol, including problems with alcohol at the age of sixteen or seventeen.

Norman testified that after Movant had established his relationship with Roderick Nunley, his co-defendant in the instant case, Norman saw Movant less frequently.

The witness also talked about the fact that he and Movant had committed crimes together in the past, neither of them assuming a leadership role in their joint enterprises.

Norman testified that he would have been willing to testify at either or both of the sentencing hear-

ings, but was incarcerated at the time of both hearings.

Next Movant called his aunt, JoAnn Taylor to testify. She testified regarding Ms. Delk's conference with Movant's family members. The Court will not detail that testimony here for the reasons stated previously herein.

Ms. Taylor stated that she spoke to Mr. McMullin on the Saturday before the sentencing hearing. She stated the conference lasted about fifteen minutes, and the participants didn't go into detail regarding the Movant. However, the witness stated that she testified before Judge Coburn on behalf of Movant, and that Mr. McMullin let her talk about those things she wanted to cover.

Mrs. Taylor stated that Movant would sleep walk and have nightmares as a child.

She further testified that after the murder was committed, which was the subject of the charges brought against Movant, his mother asked the witness to let Movant stay with her (the aunt). After awhile, the Movant then moved from his aunt's house to live with his sister.

The witness had testified in both the first and second sentencing hearings. In the first hearing, Mrs. Taylor had testified, apparently at the urging of Ms. Delk, that Movant was a playful child. At the second hearing, she testified that Movant had had problems as a child.

Movant called as his sixth witness, his sister Donna Sue Taylor. The witness testified that she met with Mr. McMullin twice. She testified that the Movant was not close to his father; that he had nightmares; that he once drew a picture of the devil;

and, that when Movant was a very young child, the babysitter had sexually abused him.

After the murder of Ann Harrison, the Movant spent a few days with his sister, Donna Sue. He had seemed distracted during this period, was always crying, and paid no attention to his personal appearance. The witness had finally asked Movant to leave her house.

The witness testified that she would have testified about these matters had she been asked to do so. However, she also stated that she had talked to Movant's attorneys before both the first and second penalty hearings, and had testified at both hearings. At the first hearing, she had testified that Movant's home had been nice. At the second hearing, she had testified that Movant's home life had not been good.

The Movant also called Tina Butler, who testified that her sister had sexually abused the Movant when he was a very young child.

Additionally, Michael Owsley was called to testify that he was represented by James McMullin. Mr. Owsley, who is presently an inmate in the Missouri Division of Adult Institutions under a sentence of death, testified that Mr. McMullin would often confuse his case with that of Movant's. Mr. Owsley's mother, Mrs. JoLinda Johnson, corroborated her son's testimony regarding Mr. McMullin's having sometimes confused her son with Movant.

Mr. Owsley further testified that Movant and he are on death row together, and that they have had occasion to discuss Mr. McMullin's representation of each of them.

The remaining witnesses who were called by the Movant were Pat Bartholome, C. John Pleban, Mar-

tin McClain, Beverly Taylor, Richard Sindel, and Dr. James Straub.

Pat Bartholome testified that she was asked by Mr. McMullin to write a social history of the Movant. She stated that she had prepared and submitted the report, but had not discussed it with Mr. McMullin.

Mr. Pleban testified that he referred Movant's case to Dr. Cuneo, who in conjunction with Mr. Pleban, decided that the review of the case by a medical doctor was needed. Dr. Pinkus was subsequently contacted and agreed to review the case.

Mr. Pleban thought that, while the Movant's family had been cooperative, a complete mitigation investigation had not been done.

He further stated that he did not think that he had done a competent job as Movant's attorney, in that he believed the Court had unfairly limited the time for preparation of the mitigation evidence.

Mr. Pleban further stated that he believed his incompetence went solely to the issues presented in mitigation.

Martin McClain, one of Movant's original attorneys, had little to add other than that he had contact with Mr. McMullin after the matter was remanded by the Supreme Court.

Beverly Taylor, who was hired for the post conviction hearing as the mitigation investigator in April, 1995, testified that it takes hours to establish rapport with witnesses who will testify regarding mitigation.

She further stated that she has not yet completed her investigation into mitigating circumstances which might be presented to the Court on Movant's behalf. The witness testified that there are several

witnesses she would still like to interview, and that such investigation might take several months.

Richard Sindel, an attorney who has experience in the representation of capital defendants, testified that it is important to interview family members separately during the investigation of mitigating circumstances. Further, that it is important that outside sources be utilized to get a complete picture of a defendant's family structure.

In the instant case, the witness had reviewed various records and reports relating to Movant. He stated that he believes that in cases similar to the case at bar, it is necessary that the attorney investigate the possibility of organic damage having occurred when evidence suggests the presence of repeated head trauma.

The witness stated that an attorney has to focus on the limited number of mitigation factors available, and that in this instance the investigation was incomplete.

However, the witness on cross examination admitted that in reaching his conclusions about this matter, he had not reviewed the transcript of the first sentencing procedure, nor had he read all of the transcript of the second sentencing. He had reviewed the briefs arising out of the initial penalty hearing and he had further read Dr. Cuneo's and Dr. Pinkus' testimony.

He further testified that he had not seen all the psychiatric or psychological reports. Mr. Sindel admitted that he did not know what all the evidence before the Court had been.

The twelfth witness in order to be called was Dr. James Straub. Dr. Straub, a psychologist from Columbia, Missouri, testified that he had reviewed

several mental reports on Movant, and had further interviewed him for approximately four hours. While he had not reached a firm diagnosis, he thought it was possible that Movant suffered from post-traumatic stress syndrome and/or possible dissociative disorder.

The general picture that emerges from the post-conviction hearing testimony of these thirteen witnesses is basically the same picture that the Court had before it at the second penalty hearing.

The witnesses who have stated that more investigation was needed either for the second penalty hearing or for the post conviction hearing, have been unable to establish through credible and specific testimony what benefit there would have been to Movant had such time been granted. There is absolutely no credible testimony before the Court that additional investigation would have resulted in a different outcome for this Movant.

17. The Movant's grounds for vacating, setting aside or correcting judgment or sentences in the underlying cause are as follows:

Movant realleges and incorporates all allegations in the original and amended motions filed in Case No. CV91-20562.

a. Movant alleges his rights were violated because the same trier of fact which decided his guilt did not impose sentence.

b. Movant alleges that his rights were violated because his guilty plea was invalid for the following reasons:

1. Movant alleges that the information was defective because it failed to cite the

statute or statutes movant allegedly violated.

2. Movant alleges that Judge Randall failed to address movant personally during the guilty plea.

3. Movant alleges that his testimony was insufficient to establish a factual basis for the plea of guilty as required by statute.

4. Movant alleges that his guilty plea was not knowing and voluntary because he was not fully informed as to the elements of the offense and the defenses available to him, specifically that the state would have to prove either deliberation and intentional killing or helping his co-defendant and that he was entitled to the defense of diminished capacity.

c. Movant alleges that he was denied his rights because the court refused to allow him to withdraw his plea of guilty and waiver of jury trial.

d. Movant alleges that the trial court lacked jurisdiction because all of the judges in the Sixteenth Judicial Circuit had previously recused themselves from this case.

e. Movant alleges that his rights were violated because Section 565.030 and 565.032 does not provide any guidance for the trial court in hearing evidence of or determining aggravating or mitigating circumstances for the imposition of the death penalty after a plea of guilty.

f. Movant alleges that the death penalty is cruel and unusual punishment.

g. Movant alleges that the imposition of the death penalty is disproportionate to the sentences imposed on other similarly situated defendants.

h. Movant alleges that the procedure set out in Section 565.032, R.S.Mo., shifts the burden of proof to the defendant on the issue of mitigation and violates the Double Jeopardy Clause of the Constitution.

i. Movant alleges that the sentence of death violates the Double Jeopardy Clause in that the hearing before this court resulted in adverse findings which were not made at the prior sentencing hearing.

j. Movant alleges that the evidence was insufficient to sustain the state's burden of proof as to the statutory aggravating circumstances pled by the state.

k. Movant alleges that the sentence violated movant's rights to equal protection because the Jackson County Prosecutor's Office based its plea bargaining policy in this case on the race of the movant and the victim.

l. Movant alleges that the sentence violated movant's rights because the prosecutor presented evidence in this case which contradicted that presented in the companion case of State v. Roderick Nunley, thus presenting false evidence.

m. Movant alleges that the sentence violated movant's rights of due process in that the review of the previous judgment, which resulted in the vacation of the death sentence only, was

insufficient because that statute deprives the movant of notice of the scope of review.

n. Movant alleges that his rights were violated because the judge who sentenced him labored under a conflict of interest and was biased, in part because the issues in the case required him to determine the effect and nature of the drinking habits of Judge Randall, a close colleague, and because the movant had a federal lawsuit against the judge pending at the time of the sentencing.

o. Movant alleges that the judgment is in violation of movant's right to effective assistance of counsel on the following grounds:

1. Leslie Delk:

A. Movant alleges that Ms. Delk was unable to effectively represent him because she had a conflict of interest with her employer.

B. Movant alleges that Ms. Delk did not obtain expert witnesses to assist in preparation of the defense of movant, specifically Mr. Lippman on the effects of drugs, because Ms. Delk was unable to obtain funds.

C. Movant alleges that Ms. Delk labored under a conflict of interest between her employer and the movant because the Public Defender sought to use its claimed cash shortage in the Michael Taylor case to obtain more funding in future cases.

D. Movant alleges that Ms. Delk failed to contact witnesses who could have provided mitigating evidence at sentencing.

E. Movant alleges that Ms. Delk failed to inform movant of his options regarding the guilty plea and a jury.

F. Movant alleges that Ms. Delk failed to attempt to obtain an agreement from the state that movant could enter a plea of guilty and be sentenced by a jury.

G. Movant alleges that Ms. Delk failed to inform movant that Judge Randall had a reputation for imbibing alcoholic beverages.

H. Movant alleges that Ms. Delk failed to make any objection, inquiry, investigation or motion to take any other action when she believed that the trial court had been imbibing alcoholic beverages prior to the sentencing.

I. Movant alleges that Ms. Delk failed to inform movant fully of the elements of the offense.

J. Movant alleges that Ms. Delk failed to inform movant of the possible availability of the defense of diminished capacity.

K. Movant alleges that Ms. Delk failed to inform movant that he did not have to plead guilty and had a right to a jury trial.

2. James McMullin, K. Louis Caskey, and C. John Pleban

A. Movant alleges that counsel failed to contact witnesses who could have provided mitigating evidence at sentencing and information about movant's mental status.

B. Movant alleges that counsel failed to present additional evidence concerning Judge Randall's drinking in support of the movant's motion to withdraw his plea of guilty.

C. Movant alleges that counsel failed to present additional evidence concerning the voluntariness of movant's plea of guilty to the trial court.

D. Movant alleges that counsel failed to present additional evidence concerning the racially biased policies of the Jackson County Prosecutor's Office in support of movant's motions to set aside his guilty plea and to disqualify the prosecutor's office.

E. Movant alleges that counsel failed to secure the disqualification of Judge Coburn, who was bias [sic] in that he failed to appoint new counsel for movant after being informed of the difficulties movant was having with his counsel.

F. Movant alleges that counsel failed to present the testimony of the movant at his sentencing hearing.

G. Movant alleges that counsel failed to investigate the possibility of movant's suf-

fering from the mental illness of multiple personality disorder which was relevant to mitigation of punishment, to the voluntariness of movant's plea of guilty, to movant's intent at the time of the offense, and to the movant's fitness to proceed.

H. Movant alleges that James McMullin had a conflict of interest in that he had previously represented Judge Alvin Randall in an alcohol-related offense, and Judge Randall;s [sic] intoxication was an issue in this case.

I. Movant alleges that James McMullin failed or was unable to communicate with movant in order to represent him adequately, and failed to exercise his best efforts to represent movant.

p. Movant alleges that the hearing in this case violated the Double Jeopardy Clause in that at the previous proceeding the evidence was insufficient to convict movant.

q. Movant alleges that the hearing in this case was held in violation of the movant's right to due process because the movant's counsel was denied the right to question the trial judge on the record concerning his bias and prejudice on the issues of the case, including but not limited to the death penalty and the results in the prior proceedings.

18. The Court finds that the Movant was advised of his rights, understood them and voluntarily, freely, and intelligently waived them.

19. The court finds that no probable cause exists to believe that the Movant failed at any time to receive effective assistance of counsel, and more specifically, that Movant's counsel was competent and effective.

20. With respect to the specific allegation of ineffective assistance of counsel raised by the Movant in his Amended Motion to Vacate, Set Aside, or Correct Judgment or Sentence, the court finds as follows:

With regard to the allegations raised by Movant against Ms. Leslie Delk in his amended second Motion to Vacate, Set Aside, or Correct Judgment or Sentence, the Court takes specific note of the fact that Ms. Delk represented Movant during his original plea of guilty and sentencing before Judge Randall. The Court finds that all those issues regarding Ms. Delk, which Movant has again raised, were either previously raised by Movant, fully litigated, and decided by the Supreme Court of Missouri; or in the alternative, were waived for failure to timely raise them, pursuant to Missouri Supreme Court Rule 24.035.

It should be further noted that Movant was successful in that previous motion, resulting in the remand to this circuit by the Missouri Supreme Court for resentencing.

This Court thus finds that the points raised by Movant in Paragraph 16. l., a through k, are not properly before this court for reconsideration. The Supreme Court by its order of June 29, 1993, by remanding for resentencing only, affirmed the vol-

untariness of the guilty plea, and thus has ruled Movant's points regarding Ms. Delk's representation against him.

21. Movant's attorneys at the time of the second sentencing hearing were Mr. James McMullin, K. Louis Caskey, and C. John Pleban. With regard to the Movant's allegations involving the alleged ineffective assistance of counsel as to these attorneys, the Court makes the following findings:

A. Regarding the allegation that counsel failed to contact witnesses who could have provided mitigating evidence at sentencing and information about movant's mental status, after a review of the record of the second sentencing hearing, this Court finds there was no ineffective assistance of counsel. The record is replete with mitigation evidence adduced by Movant's counsel. Counsel presented twelve witnesses, and numerous exhibits. Any additional witnesses regarding mitigation evidence would have been cumulative, and Movant has failed to show how he was prejudiced by the alleged failure of counsel to contact additional witnesses.

B. Movant's allegation that counsel failed to present additional evidence concerning Judge Randall's drinking in support of the Movant's motion to withdraw his plea of guilty is denied. All issues relating to Judge Randall were thoroughly litigated before the Missouri Supreme Court, and consequently are not now properly before this Court for review. Consequently, Movant was not prejudiced by counsel's alleged failure to present additional evidence on this point. Additionally, Movant was not entitled to

withdraw his guilty plea, nor did the State agree to let Movant withdraw his plea.

C. Movant's allegation that counsel failed to present additional evidence concerning the voluntariness of movant's plea of guilty to the trial court is denied. The Supreme Court of Missouri found that Movant's plea of guilty was voluntarily made, as evidenced by its remand for penalty hearing only.

D. Movant's allegation that counsel failed to present additional evidence concerning the racially biased policies of the Jackson County Prosecutor's Office in support of Movant's motions to set aside his guilty plea and to disqualify the prosecutor's office is denied. This point was thoroughly litigated by Movant's appellate counsel. Counsel offered the entire record in this case, which includes the evidence regarding alleged racial discrimination. In addition, Movant makes no showing of any prejudice by counsel's failure to try to gather additional evidence in support of his allegation.

E. Movant's allegation that counsel failed to secure the disqualification of Judge Coburn, who was biased in that he failed to appoint new counsel for Movant after being informed of the difficulties Movant was having with his counsel, is denied. After review of the argument and evidence presented on this point prior to the penalty hearing, this Court concurs with the Judge Coburn's denial of Movant's motion to appoint new counsel. Furthermore, this Court specifically finds that Judge Coburn was not

biased in that there is nothing in the record showing bias on the part of the judge.

F. Movant's allegation that counsel failed to present the testimony of the Movant at his sentencing hearing is denied. Movant was present at two separate penalty hearings before two different judges. Movant had the assistance of numerous attorneys, both publicly appointed and those in the private sector. Movant was aware of his right to testify.

G. Movant's allegation that counsel failed to investigate the possibility of movant's suffering from the mental illness of multiple personality disorder which was relevant to mitigation of punishment, to the voluntariness of movant's plea of guilty, to movant's intent at the time of the offense, and to the movant's fitness to proceed is denied. Movant presented numerous witnesses and exhibits in support of his defense of mental illness and accompanying personality disorders at his sentencing hearing. Further, no credible evidence was presented at the post conviction hearing supporting Movant's position in this regard. Movant has had the benefit of several mental examinations, and the results of those examinations were before Judge Coburn.

Movant's point is denied.

H. Movant's allegation that James McMullin had a conflict of interest in that he had previously represented Judge Alvin Randall in an alcohol-related offense, and Judge Randall's intoxication was an issue in this case, is irrelevant, and therefore, denied. This issue was raised before Judge Coburn. After a review of the record, this

Court concurs with Judge Coburn's ruling. No evidence was presented on this issue during the post conviction hearing. Movant's point is denied.

I. Movant's allegation that James McMullin failed or was unable to communicate with movant in order to represent him adequately, and failed to exercise his best efforts to represent Movant is denied. No evidence was presented on this point, merely the allegation. In addition, Movant was represented by a team of attorneys consisting of C. John Phelban, Louis Caskey, and James McMullin. Finally, Movant makes no showing of any prejudice regarding an alleged failure of communication on the part of James McMullin.

23. With respect to the specific allegations raised by Movant in his *pro se* and amended request for post conviction relief, the Court finds as follows: Movant realleges and incorporates all allegations in the original and amended motions filed in Case No. CV91-20562. As a general proposition, all allegations pertaining to the voluntariness and validity of the guilty plea have been ruled against Movant by the Missouri Supreme Court, since it remanded the case for a penalty hearing only.

A. Movant's allegation that his rights were violated because the same trier of fact which decided his guilt did not impose sentence is denied. After review of the second penalty hearing transcript containing argument on this point prior to the penalty hearing, this Court concurs with Judge Coburn's ruling that Movant's rights

were not violated. More importantly, Movant has no right to have the trier of fact impose the sentence. Additionally, Movant has failed to demonstrate how he was prejudiced in this regard.

B. Movant's four allegations that his rights were violated because his guilty plea was invalid are denied. All allegations pertaining to the guilty plea were ruled against Movant by the Missouri Supreme Court when it remanded the case for penalty hearing only.

C. Regarding Movant's allegation that he was denied his rights because the court refused to allow him to withdraw his plea of guilty and waiver of jury trial, after reviewing argument and evidence presented prior to the second penalty hearing, this Court finds that the motion was correctly overruled.

D. Movant's allegation that the trial court lacked jurisdiction because all of the judges in the Sixteenth Judicial Circuit had previously recused themselves from this case is denied. The stipulation offered by counsel states that Judge Mason recused the Sixteenth Judicial Circuit from CV91-20562 only. Furthermore, after reviewing argument and evidence presented prior to the second penalty hearing, this Court finds that the motion was correctly overruled.

E. Movant's allegation that his rights were violated because Section 565.030 and 565.032 do not provide any guidance for the trial court in hearing evidence of or determining aggravating or mitigating circumstances for the imposition of the death penalty after a plea of guilty is

denied. The Court concurs with Judge Coburn's denial of the motion when presented prior to the second penalty hearing.

F. Movant's allegation that the death penalty is cruel and unusual punishment is denied. The Missouri Supreme Court and the United States Supreme Court have both upheld the death penalty statute.

G. Movant's allegation that the imposition of the death penalty is disproportionate to the sentences imposed on other similarly situated defendants is denied. This issue has been litigated before the Supreme Court of Missouri. In addition, Movant presented Professor Nunn's racial and disproportionate studies for consideration by Judge Coburn during the second penalty hearing.

H. Movant's allegation that the procedure set out in Section 565.032, R.S.Mo., shifts the burden of proof to the defendant on the issue of mitigation and violates the Double Jeopardy Clause of the Constitution is denied. The statute has been deemed to be constitutional by the Supreme Court of Missouri and the United States Supreme Court.

I. Movant's allegation that the sentence of death violates the Double Jeopardy Clause in that the hearing before this court resulted in adverse findings which were not made at the prior sentencing hearing is denied. The Supreme Court of Missouri vacated the sentence of death imposed by Judge Randall, and remanded the case for a

new penalty hearing. No double jeopardy attaches.

J. Movant's allegation that the evidence was insufficient to sustain the state's burden of proof as to the statutory aggravating circumstances pled by the state is denied. After review of the record, this Court concurs with Judge Coburn's findings that the state satisfied its burden of proof.

K. Movant's allegation that the sentence violated movant's rights to equal protection because the Jackson County Prosecutor's office based its plea bargaining policy in this case on the race of the Movant and the victim is denied. This issue was litigated before the Supreme Court of Missouri and Movant offered additional evidence at the second penalty hearing. No additional evidence was offered at the post conviction hearing.

L. Movant's allegation that the sentence violated Movant's rights, because the prosecutor presented evidence in this case which contradicted that presented in the companion case of *State v. Roderick Nunley*, CR89-3323, thus presenting false evidence, is denied. A review of the record illustrates that Movant and his co-defendant gave conflicting accounts in their statements to the police. Each party attempted to assess more culpability to the other party than to himself. The evidence presented at each sentence would naturally be presented differently by the State. In addition, this issue was argued before Judge Coburn, and the Court [sic] concurs in Judge Coburn's ruling on this issue.

M. Movant's allegation that the sentence violated movant's rights of due process in that the review of the previous judgment, which resulted in the vacation of the death sentence only, was insufficient because that statute deprives the movant of notice of the scope of review is denied. Movant was granted remand for a new penalty hearing, and he was therefore not prejudiced by the Missouri Supreme Court's failure to give a written opinion.

N. Movant's allegation that his rights were violated because Judge Coburn, who sentenced him, labored under a conflict of interest and was biased, in part because the issues in the case required him to determine the effect and nature of the drinking habits of Judge Randall, a close colleague, and because the movant had a federal lawsuit against the judge pending at the time of the sentencing is denied. Movant offered argument and evidence on this point prior to the penalty hearing. The Court concurs in Judge Coburn's ruling on this motion. Additionally, no evidence was presented on this point at the post conviction hearing.

O. Movant's allegation that the hearing in this case violated the Double Jeopardy Clause of the United States Constitution, in that at the previous proceeding the evidence was insufficient to convict movant is denied. The record clearly illustrates that the Movant is guilty beyond a reasonable doubt.

P. Movant's allegation that the hearing in this case was held in violation of the movant's right to due process because the movant's counsel

was denied the right to question Judge Coburn on the record concerning his bias and prejudice on the issues of the case, including but not limited to the death penalty and the results in the prior proceedings is denied. Movant offered argument and evidence on this point prior to the penalty hearing, and Judge Coburn correctly overruled the motion.

18. The Court finds that the Movant was competent and mentally and emotionally stable. The Court received all relevant mitigating evidence on this point. An initial examination of Movant was conducted under Chapter 552, R.S.Mo. 1986, and forensic psychiatrists and psychologists were retained on behalf of Movant. No viable mental disease or defect defense existed.

CONCLUSIONS OF LAW

This Court has jurisdiction to hear the above-captioned cause because Movant was found guilty of a felony after a plea of guilty, and delivered to the custody of the Missouri Department of Corrections. Missouri Supreme Court Rule 24.035(a). In the case at bar, Movant's allegations, to the extent that they might warrant relief, are refuted by the transcript and the testimony at the post conviction hearing.

1. "The constitutional right to the effective assistance of counsel does not vest in the accused the right to the services of an attorney who meets any specified aptitude test or point of professional skill. "And common mistakes of judgment on the part of counsel, common mistakes of strategy, common mistakes of trial tactics, or common errors of policy in

the course of a criminal case do not constitute grounds for collateral attack upon the judgment and sentence by motion under the statute." *Sallee v. State of Missouri*, 460 S.W.2d 554, 557 (Mo. 1970). The standards for ineffective assistance of counsel are rigorous, they presume that counsel's performance falls within the wide range of professional assistance, and they place the burden squarely on the defendant to establish both incompetence and prejudice flowing from that incompetence. *Kimmelman v. Morrison*, 477 U.S. 365, 380 (1986). In the penalty phase context, the prejudice inquiry requires the defendant to show that there is a reasonable probability that, but for counsel's errors, he would not have been sentenced to death. *Kimmelman* at 380. Movant has failed to meet his burden in this regard. There was no evidence presented at the post conviction hearing that credibly demonstrates that but for counsels' alleged errors, the results for Movant would have been different at the second penalty hearing.

2. Movant asserts that he was denied effective assistance of counsel based on numerous acts and omissions of his appointed attorneys. The burden of proving ineffective assistance of counsel is the Movant's and that burden is a heavy one. *Murphy v. State*, 636 S.W.2d 697, 702 (Mo. App. 1982). Movant must prove his allegation by a preponderance of the evidence. *Sanders v. State*, 738 S.W.2d 856, 857 (Mo. banc 1987). This burden is weighted by a presumption that counsel is competent. *Id.*

3. "After a guilty plea, counsel's effectiveness is only relevant in a motion for post conviction relief to the extent that it affects the voluntariness of the

Movant's plea." *Wilkins v. State*, 802 S.W.2d 491, 497 (Mo. banc 1991) (Death Penalty); *Barylski v. State*, 473 S.W.2d 399, 401 (Mo. 1971); *Troupe v. State*, 766 S.W.2d 722, 723 (Mo. App. 1989); *Porter v. State*, 678 S.W.2d 2, 3 (Mo. App. 1984); *Rogers v. State*, 564 S.W.2d 576, 577 (Mo. App. 1978); *Bennet v. State*, 549 S.W.2d 585, 587 (Mo. App. 1977). "This requires that the Movant prove his counsel's performance was deficient and that prejudice resulted from the deficiency." *Wilkins, supra*, at 497, citing *Sidebottom v. State*, 781 S.W.2d 791, 795 (Mo. banc 1989). "A movant must satisfy both the performance prong and the prejudice prong." *Sanders v. State, supra*. As to the performance prong, Movant "must establish a serious dereliction of duty which materially affected his substantial rights and show that his guilty plea was not a knowing and intelligent act." *Short v. State*, 771 S.W.2d 859, 863 (Mo. App. 1989); *McNeal v. State*, 503 S.W.2d 19, 24 (Mo. App. 1973). Movant may attack only the knowing and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the reasonably prevailing professional norms, standards, diligence and skills that a reasonably competent attorney would exercise under similar circumstances. *Seales v. State*, 580 S.W.2d 733, 736 (Mo. banc 1979); *Williams v. State*, 765 S.W.2d 392, 393 (Mo. App. 1989); *Gentile v. State*, 637 S.W.2d 30, 32 (Mo. App. 1982). As to the prejudice prong, prejudice is shown by proof that "but for counsel's unprofessional errors, there was a reasonable probability the result would have been different." *Wilkins, supra*, at 497. Additionally, the Missouri Supreme Court has already determined the voluntariness of Movant's plea, in that after an exhaustive

review of the original proceedings, the Court remanded for sentencing only.

4. In determining whether counsel's performance was reasonable under prevailing norms, Missouri courts indulge a strong presumption that counsel's actions did indeed fall within the wide range of acceptable professional assistance. *Strickland v. Washington*, 466 U.S. 668, 689 (1984). The record reflects that counsel was not ineffective. Further, the allegations of counsel's deficient representation fail to comply with the two-pronged test set forth in the *Strickland* case. The points raised by Movant in Movant's amended Rule 24.035 Motion claiming ineffective assistance of counsel are all DENIED. The point Denied in Movant's Motion is point 0.

5. This case was remanded from the Supreme Court of Missouri; therefore, there are issues that are barred by collateral estoppel. "*Collateral estoppel* means simply that when an issue of ultimate fact has once been determined by a valid judgment, that issue cannot be again litigated between the same parties in future litigation." *City of St. Joseph v. Johnson*, 539 S.W.2d 784, 785 (Mo. App. 1976), *citing Ashe v. Swenson*, 397 U.S. 436, 442, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970). The points raised in Movant's Amended Rule 24.035 Motion that were raised before Judge Dierker in Movant's original Rule 24.035 Motion or before the Missouri Supreme Court are all DENIED.

6. The United States Supreme Court has ruled the Missouri death penalty statute is constitutional. Further, the United States Supreme Court ruled that Missouri's death penalty scheme is constitutional. *Standard v. Kentucky v. Missouri*, 492 U.S. 361

(1989). Further, the Missouri Supreme Court has held the Missouri death penalty statute is constitutional. *State v Wise*, 879 S.W.2d 494, 524 (Mo. 1994) (en banc); *State ex rel. Westfall v. Mason*, 594 S.W. 2d 908, 916 (Mo. banc 1980). Therefore, Movant's point e, f, and i in his Rule 24.035 Motion is DENIED.

7. "A defendant does not have the absolute right to withdraw his guilty plea." *Scroggins v. State*, 859 S.W.2d 704 (Mo. App. W.D. 1993). Therefore, since the Movant has no right to withdraw his guilty plea and since Movant's plea was voluntary and knowingly made, point b and c of Movant's Rule 24.035 Motion are DENIED.

8. The Court did not err in not recusing itself. Under Canon 3(c), the test for whether a judge should recuse himself is if on the record a reasonable person would find the appearance of impropriety. Movant's points d, n, and q of Movant's Rule 24.035 Motion are DENIED. Further, the Missouri Supreme Court ruled that this Court was not recused or biased when it remanded this case for further proceedings.

9. Movant argues that his due process rights were violated when the prosecution argued contrary theories of culpability in his and Roger Nunley's cases. Any contrary evidence adduced at another trial is disregarded. *See generally, State v. Young*, 610 S.W.2d 8 (Mo. App. E.D.1980). More to the point, each defendant attempted to shift the greater burden of guilt to the co-defendant in the inculpatory statement each made to the police. The Court is not now persuaded by Movant's complaint that the State used those voluntary statements to persuade the

Court of Movant's culpability. Therefore, point 1 of Movant's Rule 24.035 Motion is DENIED.

10. An information in lieu of indictment must comply with Supreme Court Rule 23.01(b). The Movant must be sufficiently informed of the charges against him. *See State v. Davis*, 830 S.W. 2d 469, 473 (1992); *State v. Hill*, 808 S.W. 2d 882, 888 (Mo. App. 1991); *Conley v. State*, 765 S.W.2d 332, 333 (Mo. App. 1992). The Movant was informed of the charges against him, and therefore, point b.1 of Movant's Rule 24.035 is DENIED.

11. A claim of double jeopardy is waived unless Movant raises it before his plea of guilty. *Soto v. State*, 858 S.W.2d 869, 870 (1993). In addition, the claim may be raised only to the extent that the face of the record can be examined to ascertain whether the conviction or sentence violates double jeopardy. *McDavis v. State*, 843 S.W.2d 369, 375 (Mo. banc 1992). The United States Supreme Court has held that in a death penalty scheme similar to that of Missouri, a sentencing judge's rejection of a single aggravating circumstance does not operate as an acquittal of that circumstance for double jeopardy purposes, and such circumstance may be considered a subsequent sentencing hearing. *Poland v. Arizona*, 106 S.Ct. 1749, 1751 (1986), 476 US 147, 90L.Ed. 2d 123. Finally, Section 565.032 has been held to be constitutional. See generally, *State v. Whitfield*, 837 S.W.2d 503 (1992); *State v. Ramsey*, 864 S.W.2d 320 (1993); *Sidebottom v. State*, 781 S.W.2d 791, cert., denied 110 S.Ct. 3295, 497 U.S. 1032, 111 L.Ed.2d 804 rehearing denied, 111 S.Ct. 6, 497 U.S. 1046, 111 L.Ed.2d 822; *State v. Amrine* 741 S.W.2d 665 (1987), cert. denied 108 S.Ct. 1756, 486 U.S. 1017, 100 L.Ed.

2d 218, *post conviction relief denied*, 785 S.W.2d 531, *cert. denied*, 111 S.Ct. 227, 498 U.S. 881, 112 L.Ed.2d 181. Therefore, Movant's Rule 24.035 points h, i, and p are DENIED.

12. Movant's point regarding the sufficiency of the State's evidence on the issue of the existence of aggravating circumstances warranting the imposition of the death penalty is denied. The record clearly demonstrates that the State through its witnesses and exhibits met its burden before Judge Coburn pursuant to Sections 565.030 and 565.032.

JUDGMENT ENTRY

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED for all of the foregoing reasons, that all allegations as set forth in Movant's *pro se* and amended motions are hereby denied, and the judgment of conviction and sentence, including the sentence of death, in 16th Judicial Circuit No. CR89-4934, shall stand in full force and effect, and the death warrant heretofore entered shall be executed as prescribed by law.

IT IS SO ORDERED.

DATE 6/19/95

/s/ EDITH L. MESSINA
EDITH L. MESSINA, Judge

164a

NOTICE OF APPEAL
TO SUPREME COURT OF MISSIOURI

Case Number CV94-19962

In the Circuit Court of _____ County, Division

MICHAEL TAYLOR

Plaintiff(s)

vs.

STATE OF MISSOURI

Defendant(s)

APPELLATE NUMBER

N/A

Filing as an Indigent

JUDGE/DIVISION

Edith Messina, Div. 12, 16th Cir.

COURT REPORTER

Sue Steen

REPORTER'S TELEPHONE

816-881-3602

DATE OF VERDICT/FINDING

June 19, 1995

DATE OF JUDGMENT/SENTENCE

June 19, 1995

DATE POST TRIAL MOTION FILED

July 19, 1995

DATE RULED UPON

August 9, 1995

165a

Jurisdiction of the Supreme Court is based on fact that this appeal involves:

The punishment imposed is death.

DATE OF NOTICE FILED

8/18/95

DATE OF APPEAL BOND

N/A

CHARGES (CRIMINAL CASES)

Murder, first degree, armed criminal action, kidnapping, rape

LENGTH OF SENTENCE

Death + life + 25 yr

APPELLANT'S NAME

Michael Taylor

ADDRESS

No. 999089, Rt. 2, Box 2222, Mineral Point, MO

TELEPHONE

none

APPELLANT'S NAME

ADDRESS

Elizabeth Unger Carlyle

Attorney at Law

200 S. Douglas St.

Lee's Summit, MO 64063

RESPONDENT'S NAME

State of Missouri

ADDRESS

P.O. Box 899, Jefferson City, MO 65102

TELEPHONE

314-751-3321

BRIEF DESCRIPTION OF CASE

Post-conviction (Rule 24.035) motion in capital case involving, inter alia, effective assistance of counsel and guilty plea issued

Signature of Attorney or Appellant

/s/ ELIZABETH U. CARLYLE

Elizabeth U. Carlyle

DATE

8-17-95

DIRECTIONS TO CLERK

The clerk is required to mail a copy of the notice of appeal by registered or certified mail to the attorneys of record of all parties other than those taking the appeal; and to mail a copy of the notice of appeal together with the docket fee to the clerk of the Supreme Court. If a party does not have an attorney, the notice must be mailed to the party at his last known address. A copy of the notice of appeal is to be sent by registered or certified mail to the Attorney General when the appeal involves a felony. The clerk should then fill in the memorandum on the reverse side hereof. (See Rules 81.08 and 30.01(h) and (i)).

SUPREME COURT OF MISSOURI, En Banc

No. 77365

August 20, 1996

Rehearing Denied September 17, 1996

STATE OF MISSOURI,

Respondent,

—v.—

MICHAEL TAYLOR,

Appellant.

Defendant pled guilty to first-degree murder, armed criminal action, kidnapping and forcible rape, and the Circuit Court, Jackson County, H. Michael Coburn and Edith Messina, JJ., denied defendant's motion to withdraw guilty plea, resentenced him to death for the murder and denied his motion for post-conviction relief. Defendant appealed. The Supreme Court, White, J., held that: (1) defendant did not suffer manifest injustice as result of fact he was sentenced by different judge than one before whom he had pled guilty; (2) defendant was not entitled to withdraw his plea on grounds of inadequate personal admonition; (3) defendant could not withdraw his plea on grounds that he was not advised that his

intent to kill victim was element of first-degree murder; (4) there was sufficient evidence of defendant's deliberation and culpable intent to warrant acceptance of defendant's plea; (5) defendant was not entitled to jury on resentencing following remand; (6) recusal of resentencing and postconviction judges was not required; (7) defendant failed to establish that prosecutor had acted with racially discriminatory purpose in deciding to seek death penalty; (8) postconviction judge properly found that mitigation investigation was adequate; and (9) defense counsel's failure to make further mitigation investigation was not ineffective assistance of counsel.

Affirmed.

HOLSTEIN, C.J., dissented with opinion.

ELIZABETH UNGER CARLYLE, LEE'S SUMMIT, for Appellant.

JEREMIAH W. (JAY) NIXON, Attorney General, BECKY OWENSON KILPATRICK, JILL C. LAHUE, Assistant Attorneys General, JEFFERSON CITY, for Respondent.

WHITE, Judge.

Michael Taylor pleaded guilty to first degree murder, section 565.020, RSMo 1986; armed criminal action, section 571.015, RSMo 1986; kidnapping, section 565.110, RSMo 1986; and forcible rape, section 566.030, RSMo 1986. He was sentenced to death for the murder. This Court has exclusive appellate jurisdiction. Mo. Const. art. V, § 3. We affirm.

I.

According to Taylor's testimony at his guilty plea, Taylor's videotaped statement and other evidence adduced in the sentencing hearing,¹ Taylor and a companion, Roderick Nunley, spent the night of March 21, 1989, driving a stolen Chevrolet Monte Carlo, stealing "T-tops," smoking marijuana and drinking wine coolers. At one point during the early morning hours of March 22, they were followed by a police car, but lost the police after a high speed chase on a highway. About 7:00 a.m., they saw fifteen-year-old Ann Harrison waiting for the school bus at the end of her driveway. Nunley told Taylor, who was driving at the time, to stop so Nunley could snatch her purse. Taylor stopped the car, Nunley got out, pretended to need directions, grabbed her and put her in the front seat between Taylor and Nunley. Once in the car, Nunley blindfolded Ann with his sock and threatened to stab her with a screwdriver if she was not quiet. Taylor drove to Nunley's house and took Ann to the basement. By this time her hands were bound with cable wire.

Nunley removed Ann's clothes and had forcible sexual intercourse with her. Taylor then had forcible intercourse with her. They untied her, and allowed her to dress. Ann tried to persuade them to call her parents for ransom, and Nunley indicated he would take her to a telephone to call home. They put the blindfold back on her and tied her hands and led her to the trunk of the Monte Carlo. Ann resisted getting

¹ Evidence adduced in Taylor's sentencing hearing reveals a different factual version of the crime than does evidence adduced in Nunley's proceedings. See *State v. Nunley*, 923 S.W.2d 911 (Mo. banc 1996).

into the trunk until Nunley told her it was necessary so she would not be seen. Both men helped her into the trunk.

Nunley then returned to the house for two knives, a butcher knife and a smaller steak knife. Nunley argued with Taylor about whether to kill her. Nunley did not want Ann to be able to testify against him and emphasized he and Taylor were in this together. Nunley then attempted to slash her throat but the knife was too dull. He stabbed her through the throat and told Taylor to "stick her." Nunley continued to stab, and Taylor stabbed Ann "two or three times, probably four." He described how "her eyes rolled up in her head, and she was sort to like trying to catch her, her breath."

Nunley and Taylor argued about who would drive the Monte Carlo, and Nunley ended up driving it following Taylor who was driving another car. Taylor picked up Nunley after he abandoned the Monte Carlo with Ann Harrison in the trunk. They returned to Nunley's house where Nunley disposed of the sock, the cable wire, and the knives.

When the school bus arrived at the Harrison home to pick up Ann, the driver honked because she was not there. Mrs. Harrison looked out of the window and noticed Ann's purse, gym clothes, books, and flute lying on the driveway. She waved for the bus to go on and began to look for her daughter. Police quickly mounted a ground and air search. Ann Harrison's body was discovered the evening of March 23rd when police found the abandoned Monte Carlo and a friend of the car's owner opened the trunk.

The State's physical evidence included hair matching Taylor's collected from Ann Harrison's body and the passenger side of the Monte Carlo, hair matching

Ann's collected from Nunley's basement, sperm and semen belonging to Taylor found on Ann's clothes and body. An autopsy revealed a lacerated vagina, six stab wounds to Ann's chest, side, and back which penetrated her heart and lungs, and four stab wounds to her neck. The medical examiner testified Ann Harrison was alive when all the wounds were inflicted and could have remained conscious for ten minutes after the stabbing. She probably lived thirty minutes after the attack.

II.

Taylor pleaded guilty to the four crimes on February 8, 1991. He testified he did not receive or expect a plea bargain and understood the State would seek the death penalty. After a sentencing hearing, the trial court found aggravating circumstances outweighed mitigating circumstances and sentenced Taylor to death for the first degree murder, with consecutive sentences of ten years for armed criminal action, fifteen years for kidnapping, and life for aggravated rape.

Taylor filed a timely Rule 24.035 motion, which alleged the trial court was under the influence of alcohol during sentencing and the sentencing hearing and counsel was ineffective for failing to learn of the trial court's alcohol problem before advising Taylor to plead guilty. The trial court promptly recused. The presiding judge of the sixteenth circuit notified this Court all judges in the circuit were recused. This Court then appointed a special judge to conduct the Rule 24.035 proceeding. After an evidentiary hearing, the special judge denied the Rule 24.035 motion. Taylor appealed the sentence and

denial of his Rule 24.035 motion. This Court issued a summary order in June 1993, stating, "Judgment vacated. Cause remanded for new penalty hearing, imposition of sentence, and entry of new judgment."

The original trial court transferred the remanded case to the presiding judge for reassignment. The presiding judge assigned the case to division nine of the sixteenth circuit. This Court ordered the cause transferred to a judge from the first circuit on March 31, 1994, but rescinded the order on April 5. Before the second sentencing hearing, the court denied Taylor's Rule 29.07 motion to withdraw the guilty plea, his motion requesting a jury for sentencing, and his motion asking for disqualification of the entire sixteenth circuit. The court received evidence on sentencing in five days of hearings during May and June 1994. The court found beyond a reasonable doubt nine aggravating circumstances were not outweighed by the mitigating circumstance. Taylor was sentenced to death for the first degree murder and consecutive terms of fifty years for armed criminal action, fifteen years for kidnapping, and life for rape.

Taylor filed a timely Rule 24.035 motion and amended motion. He also moved for disqualification of the judge. On the death of the judge who heard the most recent sentencing, the cause was transferred to another division of the sixteenth circuit. After a two-day hearing, the court overruled the Rule 24.035 motion.

III.

Taylor attacks denial of his Rule 29.07(d) motion to withdraw his plea of guilty on several grounds. He claims the sentencing court should have sustained

his motion to withdraw the guilty plea because he did not receive the benefit of his plea bargain, the court failed to personally admonish him as required by Rule 24.02, the plea was not knowingly and voluntarily made because Taylor was not informed of the elements of first degree murder and the possibility of jury sentencing, there was insufficient factual basis to support the plea, and the plea was offered to a defective information. The State, instead of addressing the merits of these claims, argues the sentencing court was limited by the remand from this Court to determine only sentencing issues and was without authority to consider a motion to withdraw a guilty plea.

As discussed in *State v. Nunley*, 923 S.W.2d 911, 919 (Mo. banc 1996), this Court's summary order remanding the cause neither affirmed nor reversed the guilty plea, and the sentencing court could consider the Rule 29.07 motion. We review denial of a presentencing motion to withdraw a guilty plea to determine if the court's ruling is an abuse of discretion. *State v. McCollum*, 610 S.W.2d 81, 83 (Mo.App.1980). The accused is not entitled to withdraw a guilty plea as a matter of right; such relief is reserved for extraordinary circumstances, such as a showing of fraud, mistake, misapprehension, fear, persuasion, or the holding out of false hopes. *Id.*

A. Benefit of the Plea Bargain

Taylor argues he was denied the benefit of his plea bargain when he was sentenced by a different judge than the one before whom he originally agreed to plead guilty. He expected to be sentenced by the original judge, sober and in full possession of his

faculties. Although it is preferable if the judge to whom a plea is made sentences the defendant, sentencing by a different judge if the original judge proves unavailable for sentencing does not create manifest injustice.² *Nunley*, 923 S.W.2d at 921-22. The determining factor is whether the sentencing judge has the familiarity with the prior proceedings to make an informed ruling on sentencing. *Id.* The record reveals the sentencing court after remand from this Court conducted five days of hearings, took judicial notice of all prior proceedings, and made an informed decision.

Taylor argues the consideration for his open guilty plea was not only having the original judge sentence him, but the judge would be unimpaired at sentencing. As previously discussed, Taylor was not entitled, as a matter of right, to be sentenced by the judge before whom he entered his plea. The Rule 29.07 motion was filed before sentencing on remand. Because he had not yet been sentenced, there was no impaired sentencer issue remaining. *See Nunley*, 923 S.W.2d at 919 ("By remanding for a new penalty hearing and imposition of sentence, certain allegations regarding the original trial judge were rendered moot."). In the present case, Taylor makes no allegations regarding the competence of the remand sentencing judge. Denial of Taylor's motion to withdraw his guilty plea for failure of consideration was not an abuse of discretion.

² The issue in *Nunley* was decided on plain error review because the issue had not been raised until after his Rule 29.07 motion. *Nunley*, 923 S.W.2d at 920. The standard of review in the present case is abuse of discretion because Taylor raised the issue in his Rule 29.07 motion.

B. Personal Admonition by the Court

Taylor charges the court with error for failure to allow him to withdraw his guilty plea because the court did not personally inform him of the matters required in Rule 24.02 when his guilty plea was accepted. Rule 24.02(b) provides: "[T]he court must address the defendant personally in open court, and inform him of, and determine that he understands," the specific information enumerated in the rule. A similar requirement in Rule 24.02(c) assures the court the plea is voluntary.

The plea hearing transcript reveals the court swore Taylor in, then allowed defense and prosecuting attorneys to question defendant concerning the factual basis for the plea, the voluntary nature of the plea, and his understanding of all the rights waived by the guilty plea. Taylor specifically testified he understood, was informed of, and waived his rights. He answered more than three hundred questions encompassing all of the required advice in Rule 24.02 in detail. The court asked only a few questions, but did interrupt to correct or elaborate as needed. The court was an active participant.

Taylor contends the court's failure to use its own voice to admonish the defendant justifies withdrawal of the plea. He looks for support to *Dean v. State*, 901 S.W.2d 323 (Mo.App.1995). In *Dean*, the court held asking defendant to read a document and relying on defendant's attorney to ascertain he understood the document did not fulfill the requirements of the Rule 24.02 admonition. *Id.* at 327. In the present case, the court was more actively involved. The court saw to it the defendant was informed of all the advice required by Rule 24.02 and

more. By hearing the extensive questioning, correcting misstatements, and asking a few questions, the court made a personal determination as to defendant's understanding of the waiver and the voluntariness of the plea. Although not all of the required admonition came directly from the court's lips, the court did address the defendant personally in open court, cause him to be informed of the consequences of his plea, and determine the defendant understood the consequences and voluntarily entered the plea.

"Among the purposes of Rule 24.02 is the intention that the court be convinced that the defendant understands the specific charges and the maximum penalty confronting him and that the defendant recognizes that by pleading guilty, he waives a number of legal rights." *Steinle v. State*, 861 S.W.2d 141, 143 (Mo.App.1993). The plea hearing record indicates the procedure used by the court accomplished this purpose. In *Dean*, after the appellate court determined a violation of Rule 24.02 had occurred, the cause was remanded for a hearing to determine whether the plea was intelligently and voluntarily made. *Dean*, 901 S.W.2d at 328. The plea would be vacated only on such a showing. *Id.* In the present case, the record provides ample evidence Taylor's plea was knowing and voluntary. See *Beaver v. State*, 702 S.W.2d 149, 150-51 (Mo.App.1985) (during plea hearing, attorney rather than judge informed defendant of potential penalties held sufficient under Rule 24.02 because record reflected plea made voluntarily and intelligently).

C. Improper Advice

Taylor claims his plea was not knowing and voluntary because he was not properly advised as to the elements of first degree murder and he was not informed of the possibility of jury sentencing. It is reversible error to accept a guilty plea not knowingly and voluntarily made. *Boykin v. Alabama*, 395 U.S. 238, 244, 89 S.Ct. 1709, 1712-13, 23 L.Ed.2d 274 (1969).

Taylor argues his plea was not knowingly made because he was not advised he had to have the intent to kill Ann Harrison to be guilty of first degree murder. He points to the plea record where his counsel asked him, "Do you understand that to be guilty of first degree murder that you had to either have killed the victim in this case premeditatedly and deliberately or that you had to, in other words, in concert, have helped or assisted Mr. Nunley during that; do you understand that?" If this was the only evidence of the charge in the record, Taylor could argue he pleaded guilty subject to a misunderstanding of the elements of first degree murder. However, later in the plea hearing, Taylor admitted he reflected before killing the victim. Taylor's recitation of the factual basis of the plea indicated he stabbed Ann Harrison knowing their actions would kill her.

"When an accused admits in open court facts which constitute the offense for which he is charged, he cannot thereafter withdraw his plea on the assertion that he did not understand the nature of the charge to which he plead guilty." *Wedlow v. State*, 841 S.W.2d 214, 216 (Mo.App.1992) (citing *Western v. State*, 760 S.W.2d 174, 176

(Mo.App.1988)). The record, taken as a whole, supports the court's determination the plea was made knowingly and voluntarily. "[A] trial court is not required to explain every element of a crime to which a person pleads guilty" so long as the defendant understands the nature of the charge. *Beaver*, 702 S.W.2d at 150. The record supports such an understanding.

Taylor also argues the plea was not knowingly made because he was not informed a jury could sentence him if the State consented under section 565.006.2, RSMo 1986:

No defendant who pleads guilty to a homicide offense or who is found guilty of a homicide offense after trial to a court without a jury shall be permitted a trial by jury on the issue of the punishment to be imposed, except by agreement of the state.

As is obvious from the language of the statute, jury sentencing after a guilty plea is not a right for the defendant to waive, rather a privilege for the State to grant. Taylor did not waive sentencing by a jury because he could only obtain jury sentencing if the State agreed to it. The State did not agree; therefore, there was nothing of which to inform him. A knowing and voluntary plea does not require defendant be told details irrelevant to the decision at hand. See *Wedlow*, 841 S.W.2d at 217; *Huffman v. State*, 703 S.W.2d 566, 569 (Mo.App.1986). Failure to inform Taylor of the possibility of sentencing by a jury did not render his guilty plea unknowing or involuntary.

D. Insufficient Factual Basis for the Plea

Taylor asserts his equivocal testimony about culpable mental state and deliberation fails to reveal a factual basis to support his guilty plea. "The court shall not enter a judgment upon a plea of guilty unless it determines that there is a factual basis for the plea." Rule 24.02(e). The factual basis does not have to be established from defendant's words alone as long as the basis exists. *Smith v. State*, 663 S.W.2d 248, 249 (Mo.App.1983).

The plea hearing record indicates initially Taylor did not want to kill Ann Harrison and argued for her release. He and Nunley argued, and Taylor did succumb to Nunley's urging, deliberated, and stabbed Ann Harrison repeatedly. From his description of the types of wounds inflicted, he had to know their conduct would result in her death. He testified he was reluctant to participate at first, "because I never killed nobody in my life, and I ain't never watched nobody get killed." He was under no illusions the conduct was for any purpose other than murder. According to Taylor's version of the crime, he deliberated longer than Nunley did.

Defense counsel mistakenly suggested Taylor could be guilty of first degree murder if he helped Nunley kill the victim. The State's attorney asked Taylor if he reflected "before killing her, before stabbing her." Both of these questions alone are insufficient to establish the combination of culpable mental state and deliberation required for first degree murder. However, Taylor's testimony as a whole established the culpable intent with deliberation required to support first degree murder.

E. Defective Information

Taylor argues the information charging him with first degree murder citing the statutes imposing primary liability was defective because the evidence offered at the plea supported only accessory liability, but failed to cite accessory liability statutes. The information charges, "Taylor, either acting alone or purposely in concert with another, after deliberation, knowingly caused the death of Ann M. Harrison by stabbing her." Taylor asserts this failed to inform him of the actions which subjected him to criminal liability.

Rule 23.01.(b)4 requires an information to cite the section of the statute alleged to have been violated and the section fixing the penalty. Rule 23.11 requires prejudice of the substantial rights of the defendant before an information shall be considered invalid. Citing the incorrect statute in the information does not necessarily render the information insufficient. *State v. LaPlant*, 673 S.W.2d 782, 785 (Mo. banc 1984). The primary purpose of an information is to give defendant sufficient notice of the charge to allow adequate preparation of a defense and avoid retrial on the same charges in case of acquittal. *State v. Hill*, 808 S.W.2d 882, 888 (Mo.App.1991). Moreover, an information may charge a defendant either as a principal or as an accessory with the same legal effect. *Id.*

As previously discussed, the plea hearing produced sufficient evidence to support a guilty plea to first degree murder. Assuming *arguendo* he was convicted as an accessory, not a principal, there was no prejudice to his substantial rights. *See id.* The charge did not deprive Taylor of the opportunity to

assert any defense. It was not an abuse of discretion to overrule Taylor's motion to withdraw the guilty plea.

IV.

Taylor argues his death sentence should be vacated, or in the alternative, he should be permitted to withdraw his guilty plea because he was denied a jury on resentencing. Taylor relies on section 565.035.5 which provides:

In addition to its authority regarding correction of errors, the supreme court, with regard to review of death sentences, shall be authorized to:

- (1) Affirm the sentence of death; or
- (2) Set the sentence aside and resentence the defendant to life imprisonment without eligibility for probation, parole, or release except by act of the governor; or
- (3) Set the sentence aside and remand the case for retrial of the punishment hearing. A new jury shall be selected or a jury may be waived by agreement of both parties and then the punishment trial shall proceed in accordance with this chapter, with the exception that the evidence of the guilty verdict shall be admissible in the new trial together with the official transcript of any testimony and evidence properly admitted in each stage of the original trial where relevant to determine punishment.

Section 565.035.5, RSMo 1994.

Initially, we must note the right to a jury on the issue of punishment in a first degree murder case is created by statute. *State v. Hunter*, 840 S.W.2d 850, 863 (Mo. banc 1992), *cert. denied*, 509 U.S. 926, 113 S.Ct. 3047, 125 L.Ed.2d 732 (1993) (citing *Spaziano v. Florida*, 468 U.S. 447, 460, 104 S.Ct. 3154, 3162, 82 L.Ed.2d 340 (1984)). "A defendant has no constitutional right to have a jury assess punishment." *Id.* Furthermore, a defendant who pleads guilty is not permitted to have a jury trial on the issue of punishment without the State's agreement. Section 565.006.2, RSMo 1994. Here, the State has not agreed to allow Taylor a jury trial on the issue of punishment. As such, Taylor's reliance on section 565.035.5(3) is misplaced.

Section 565.035.5 provides the safeguard procedure for this Court to follow for independent review of all death sentences. Section 565.035.5(3) does not provide a defendant a right to a jury trial on the imposition of sentence where such a right did not exist prior to remand. However, where a defendant previously had a right to have a jury impose sentence, section 565.035.5(3) does allow "a new jury" to be selected for purposes of imposing sentence.

Under the circumstances of this case, where defendant pleaded guilty without recommendation, this Court issued a summary order remanding the cause, this Court refrained from engaging in a proportionality review of the sentence of death, and the State does not agree to a jury trial on the imposition of sentence, we find section 565.035.5(3) does not entitle Taylor to "a new jury" for imposition of punishment because he never obtained nor possessed the right to a jury for imposition of punishment prior

to this Court's remand order. Taylor's point is denied.

V.

Defendant raises several arguments regarding the "jurisdiction" of the two trial judges who presided after this Court's summary order. Defendant first argues the judge who resentenced him lacked jurisdiction to hear the case. Defendant relies on the original trial judge's recusal and the subsequent order by the presiding judge of the sixteenth circuit which recused all sixteenth circuit judges.

When the alcohol allegation arose, the original trial judge recused and transferred the case to the presiding judge of the sixteenth circuit. After defendant's first appeal, this Court issued a summary order remanding the case to the sixteenth circuit. Thereafter, the case was apparently sent to the original trial judge's division. The original trial judge then entered an order transferring the case to the presiding judge for reassignment. Defendant contends after this Court's remand the original trial judge lacked jurisdiction to transfer the case to the presiding judge for reassignment. Therefore, according to defendant, the presiding judge's subsequent assignment of the case to the judge who resentenced him was void. Defendant asserts he was prejudiced and his due process rights were violated by this "violation of the rules" for assigning judges.

A disqualified judge lacks jurisdiction to rule on any matters which did not precede a proper objection seeking disqualification. *State ex rel. Raack v. Kohn*, 720 S.W.2d 941, 944 (Mo. banc 1986). But after disqualification, a judge does have the power to

transfer the case to another judge. *State v. Van Horn*, 625 S.W.2d 874, 878 (Mo.1981). The original trial judge's action was consistent with Rule 32.10, which provides a disqualified judge shall transfer the case to the presiding judge. The original trial judge properly transferred the case to the presiding judge. Moreover, defendant fails to demonstrate a violation of his due process rights or prejudicial error. The order transferring the case to the presiding judge did not impact defendant's rights because the original trial judge had previously recused from both the criminal and post-conviction proceedings.

The two cases primarily relied on by defendant are distinguishable. Those cases involve a trial court's reversal of a previous grant of summary judgment and an order that set aside a default judgment and granted a new trial, with both orders being entered after the judge had been disqualified. *State ex rel. Johnson v. Mehan*, 731 S.W.2d 887, 888 (Mo.App.1987); *Byrd v. Brown*, 613 S.W.2d 695, 699 (Mo.App.1981). Defendant's contention regarding the original judge's recusal and order transferring the case to the presiding judge is denied.

Defendant's reliance on the order by the presiding judge of the sixteenth circuit is also misplaced. In *Nunley*, this Court held the presiding judge did not have the authority to issue an order recusing all sixteenth circuit judges. *Nunley*, 923 S.W.2d at 917-18. As in *Nunley*, defendant in the present case cannot rely on an order that the presiding judge did not have the authority to issue. Accordingly, defendant's argument fails.

Defendant next argues the resentencing judge erred in denying his motion to recuse and the denial

violated his rights to due process. Defendant contends an inherent conflict of interest existed, which cast doubt on the judge's impartiality.

The United States and Missouri Constitutions guarantee a criminal defendant an impartial tribunal. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242, 100 S.Ct. 1610, 1613, 64 L.Ed.2d 182 (1980); *State v. Wise*, 879 S.W.2d 494, 523 (Mo. banc 1994), *cert. denied*, 513 U.S. 1093, 115 S.Ct. 757, 130 L.Ed.2d 656 (1995). "Due process concerns permit any litigant to remove a biased judge." *Thomas v. State*, 808 S.W.2d 364, 367 (Mo. banc 1991). Rule 2, Canon 3(D)(1) of the Code of Judicial Conduct requires a judge to recuse in a proceeding where the judge's impartiality might reasonably be questioned. The test under the canon is whether a reasonable person would have a factual basis to doubt the judge's impartiality. *State ex rel. Wesolich v. Goeke*, 794 S.W.2d 692, 698 (Mo.App.1990).

Defendant asserts if the resentencing judge imposed a different sentence than the original trial judge then this would support the allegation the original judge was under the influence of alcohol during sentencing. Defendant also claims if the resentencing judge imposed the death penalty this would appear to be giving the original judge a vote of confidence. According to defendant, this demonstrates an inherent conflict of interest existed for the resentencing judge or for any other sixteenth circuit judge.

This Court rejected a similar argument in *Nunley*. In that case, defendant, Nunley, argued it was unrealistic to ask the resentencing judge from the sixteenth circuit to set aside his feelings for the original trial judge and to come to an "independent

determination" regarding his sentencing. *Nunley*, 923 S.W.2d at 918. Nunley asserted the resentencing judge could not be impartial because he and the original trial judge were from the same circuit. *Id.* This Court noted Nunley did not contend and nothing in the record reflected any special relationship between the resentencing judge and the original trial judge. *Id.* This Court held an allegation the original trial judge had been drinking was insufficient, by itself, to compel recusal of the resentencing judge. *Id.*

As in *Nunley*, defendant does not suggest and the record does not reflect any special relationship between the resentencing judge and the original trial judge. The analysis in *Nunley* applies in this case. In many instances, judges reconsider rulings by other judges. The fact an alcohol allegation necessitated the original trial judge's recusal does not compel recusal for all other judges within the sixteenth circuit. *Id.* Defendant's allegation of a conflict of interest for any sixteenth circuit judge resentencing defendant is too attenuated to require recusal.

Defendant also asserts strong public opinion about the case required recusal. Defendant relies on a letter from a person asking the resentencing judge to impose the death penalty. The judge also received a letter from another person thanking the judge for imposing the death penalty. It is not unusual for a judge to receive letters from the public or for there to be publicity for crimes such as in this case. *State v. Schneider*, 736 S.W.2d 392, 403-04 (Mo. banc 1987) (discussing denial of motion for change of venue), *cert. denied*, 484 U.S. 1047, 108 S.Ct. 786, 98 L.Ed.2d 871 (1988); *State v. Woollen*, 643 S.W.2d 270, 272 (Mo.App.1982). Under the facts presented here,

this is simply an insufficient basis for recusal. The resentencing judge did not err in denying defendant's motion to recuse.

Defendant also argues the judge hearing his Rule 24.035 motion erred in denying his motion to recuse. In the alternative, defendant argues the post-conviction judge erred by not having a different judge hear the recusal motion.

Defendant filed a motion to disqualify the resentencing judge from hearing the Rule 24.035 motion. The resentencing judge did not rule on this motion prior to his death. Defendant subsequently filed supplemental suggestions for the motion to disqualify. Defendant contends on appeal the factors requiring the post-conviction judge to recuse are identical to those requiring the resentencing judge and all sixteenth circuit judges to recuse. As previously discussed, the resentencing judge was not required to recuse. The reasoning for the resentencing judge applies for the post-conviction judge. Accordingly, the post-conviction judge did not err in denying defendant's motion to recuse. In addition, because the motion to disqualify was substantively insufficient, the judge did not err by not having a different judge hear the recusal motion. *See State ex rel. Wesolich*, 794 S.W.2d at 699. Defendant's points regarding jurisdiction of the two judges are denied.

VI.

A. Decision to Seek Death Penalty

Taylor urges his sentence be vacated because the decision to seek the death penalty was the product of racial discrimination by the prosecutor's office in

violation of the Equal Protection Clause. He raised this issue in his Rule 29.07 motion and in his Rule 24.035 motion. In support, he points to statistical evidence concerning Jackson County cases charging first degree murder in the three years before Taylor's sentencing, allegations an assistant prosecutor involved in his original plea was biased, allegations of discrimination by Jackson County prosecutors in jury selection, allegations of racial slurs and employment discrimination in the prosecutor's office, the State's unusual refusal to offer life without parole in exchange for a guilty plea, and a study of racial disparity in Missouri capital punishment cases covering 1977 to 1991.

A prosecutor's broad discretion does not extend to decisions deliberately based on unjustifiable standards such as race or some other entirely arbitrary factor. *Wayte v. United States*, 470 U.S. 598, 608, 105 S.Ct. 1524, 1531, 84 L.Ed.2d 547 (1985). To show an equal protection violation, Taylor must prove both the prosecutor's decision had a discriminatory effect on him and it was motivated by discriminatory purpose. *Id.* "Because discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused." *McCleskey v. Kemp*, 481 U.S. 279, 297, 107 S.Ct. 1756, 1770, 95 L.Ed.2d 262 (1987).

Only one of Taylor's allegations pertains to decisions made in his case. The Jackson County and Missouri studies, assuming *arguendo* they are valid and reliable, apply to discriminatory effect of decisions, but do not show purposeful discrimination or any effect on his case, specifically. "To prevail under the Equal Protection Clause, [defendant] must prove

that the decisionmakers in *his* case acted with discriminatory purpose." *Id.* at 292, 107 S.Ct. at 1767 (emphasis in original). The other allegations of discrimination within the prosecutor's office were irrelevant because they did not involve decision makers, were remote in time, and did not show discriminatory purpose in his case.

The allegation of discrimination specific to this case is the prosecutor's refusal to exchange a recommendation of life without parole for Taylor's guilty plea to first degree murder. Taylor charges the race of defendant and victim must be the reason for the prosecutor's decision. More likely, the unique circumstances of Ann Harrison's murder and the strength of the State's case motivated the prosecutor's decision. "Where the discretion that is fundamental to our criminal process is involved, we decline to assume that what is unexplained is invidious." *Id.* at 313, 107 S.Ct. at 1778. Taylor failed to produce exceptionally clear proof of an equal protection violation in the prosecutor's decision to seek the death penalty.

B. Sentencing Scheme

Defendant argues the statutory scheme for the death penalty under section 565.032 violates his right to due process. Defendant contends the sentencer has discretion to impose the death penalty in any first degree murder case because one of the statutory aggravating circumstances provided in section 565.032 "can apply in *any* case of first degree murder."

An aggravating circumstance "may not apply to every defendant convicted of a murder; it must

apply only to a subclass of defendants convicted of murder." *Tuilaepa v. California*, 512 U.S. 967, —, 114 S.Ct. 2630, 2635, 129 L.Ed.2d 750 (1994). "If the sentencer fairly could conclude that an aggravating circumstance applies to *every* defendant eligible for the death penalty, the circumstance is constitutionally infirm." *Arave v. Creech*, 507 U.S. 463, 474, 113 S.Ct. 1534, 1542, 123 L.Ed.2d 188 (1993). Defendant does not challenge a specific aggravating circumstance under section 565.032 but rather suggests one of the seventeen statutory aggravating circumstances can be found in every first degree murder case. Review of the statutory aggravating circumstances and the elements for first degree murder under section 565.020 simply does not reveal one of the statutory aggravating circumstances could be found in each case of first degree murder. Defendant's claim is denied.

C. Independent Review

Pursuant to section 565.035.5, RSMo 1994, this Court must determine: (1) whether the death sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor; (2) whether the statutory aggravating circumstances and any other circumstances found by the trial court were supported by the evidence; and (3) whether the sentence is excessive or disproportionate to similar cases.

There is no evidence defendant's sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor.

The trial court found the following statutory aggravating circumstances: the murder was outra-

geously and wantonly vile, horrible, and inhuman; the murder was committed by a person who escaped from a place of lawful confinement; the murder was committed while the defendant was engaged in the perpetration of kidnapping, rape, and attempted armed robbery; and the victim was killed as a result of her status as a witness.³ Section 565.032.2(7)(9)(11)(12), RSMo 1986. The trial court also found defendant had seven prior felony convictions, defendant escaped from the custody of the Jackson County Department of Corrections and after being apprehended threatened a corrections officer, and defendant inflicted "inconceivable physical torture and emotional suffering" upon the victim. The evidence supported the trial court's findings on all of the aggravating circumstances.

This Court has compared similar cases where the murder was outrageously or wantonly vile, horrible or inhuman. *State v. Nunley*, 923 S.W.2d 911; *State v. Richardson*, 923 S.W.2d 301, (Mo. banc 1996); *State v. Powell*, 798 S.W.2d 709 (Mo. banc 1990); *cert. denied*, 501 U.S. 1259, 111 S.Ct. 2914, 115 L.Ed.2d 1077 (1991), *State v. Oxford*, 791 S.W.2d 396 (Mo. banc 1990), *cert. denied*, 498 U.S. 1055, 111 S.Ct. 769, 112 L.Ed.2d 789 (1991); *State v. McMillin*, 783 S.W.2d 82 (Mo. banc), *cert. denied*, 498 U.S. 881, 111 S.Ct. 225, 112 L.Ed.2d 179 (1990); *State v. Kilgore*, 771 S.W.2d 57 (Mo. banc 1989), *cert. denied*, 493 U.S. 874, 110 S.Ct. 211, 107 L.Ed.2d

³ Prior to the crimes being committed, defendant had failed to return to a halfway house while on conditional release. A halfway house is considered a place of confinement for purposes of section 565.035.2(9). *State v. Walls*, 744 S.W.2d 791, 799 (Mo. banc), *cert. denied*, 488 U.S. 871, 109 S.Ct. 181, 102 L.Ed.2d 150 (1988).

164 (1989); *State v. Lingar*, 726 S.W.2d 728 (Mo. banc), *cert. denied*, 484 U.S. 872, 108 S.Ct. 206, 98 L.Ed.2d 157 (1987); *State v. Mercer*, 618 S.W.2d 1 (Mo. banc), *cert. denied*, 454 U.S. 933, 102 S.Ct. 432, 70 L.Ed.2d 240 (1981). In other cases, the death penalty was imposed where the defendant committed murder in conjunction with other crimes involving force. *Nunley*, 923 S.W.2d 911; *State v. Brown*, 902 S.W.2d 278 (Mo. banc), *cert. denied*, 516 U.S. 1031, 116 S.Ct. 679, 133 L.Ed.2d 527 (1995); *State v. Gray*, 887 S.W.2d 369 (Mo. banc 1994), *cert. denied*, 514 U.S. 1042, 115 S.Ct. 1414, 131 L.Ed.2d 299 (1995); *State v. Ramsey*, 864 S.W.2d 320 (Mo. banc 1993), *cert. denied*, 511 U.S. 1078, 114 S.Ct. 1664, 128 L.Ed.2d 380 (1994); *State v. Six*, 805 S.W.2d 159 (Mo. banc), *cert. denied*, 502 U.S. 871, 112 S.Ct. 206, 116 L.Ed.2d 165 (1991); *State v. Petary*, 781 S.W.2d 534 (Mo. banc 1989), *vacated and remanded*, 494 U.S. 1075, 110 S.Ct. 1800, 108 L.Ed.2d 931, *reaffirmed*, 790 S.W.2d 243 (Mo. banc), *cert. denied*, 498 U.S. 973, 111 S.Ct. 443, 112 L.Ed.2d 426 (1990); *State v. Griffin*, 756 S.W.2d 475 (Mo. banc 1988), *cert. denied*, 490 U.S. 1113, 109 S.Ct. 3175, 104 L.Ed.2d 1036 (1989). This Court has also compared similar cases where the victims were killed because of their potential status as witnesses. *Nunley*, 923 S.W.2d 911; *State v. Parker*, 886 S.W.2d 908 (Mo. banc 1994); *cert. denied*, 514 U.S. 1098, 115 S.Ct. 1827, 131 L.Ed.2d 748 (1995); *State v. Shurn*, 866 S.W.2d 447 (Mo. banc 1993), *cert. denied*, 513 U.S. 837, 115 S.Ct. 118, 130 L.Ed.2d 64 (1994); *State v. Davis*, 814 S.W.2d 593 (Mo. banc 1991), *cert. denied*, 502 U.S. 1047, 112 S.Ct. 911, 116 L.Ed.2d 812 (1992); *Six*, 805 S.W.2d 159. Considering the crime, the evidence, and defendant, the penalty imposed is not excessive or

disproportionate to the penalties imposed in similar cases.

Defendant cites several cases where the death penalty was not imposed and claims these cases are factually similar to the present case. The cases relied on by defendant and others have been examined. None have the aggravating circumstances and the absence of significant mitigating circumstances that are presented in this case. Defendant's claim is denied.

D. Proportionality Review Scheme

Defendant argues this Court's proportionality review under section 565.035.3(3) violates his due process rights. Defendant contends the statute and this Court's cases provide inadequate guidance to a defendant who wants to argue imposition of the death penalty is disproportionate. Defendant suggests this Court should adopt a type of statistical analysis when conducting proportionality review.

Proportionality review is not constitutionally required but rather is required by section 565.035. *State v. Weaver*, 912 S.W.2d 499, 522 (Mo. banc 1995). We have previously rejected defendant's argument the method used by this Court to conduct proportionality review violates a defendant's due process rights. *Id.*; *State v. Whitfield*, 837 S.W.2d 503, 514-15 (Mo. banc 1992). This Court has also previously rejected defendant's suggested adoption of a type of statistical analysis for proportionality review. *Id.*; *State v. Ramsey*, 864 S.W.2d 320, 327-28 (Mo. banc 1993), *cert. denied*, 511 U.S. 1078, 114 S.Ct. 1664, 128 L.Ed.2d 380 (1994). Defendant's claim fails.

VII.

Adequate mitigation investigation is the linchpin of Taylor's final three points relied on. Taylor argues the post-conviction relief court's finding that mitigation investigation was adequate is clearly erroneous. Alternatively, he argues those findings are insufficient. Because the investigation was inadequate, Taylor's reasoning goes, counsel for the first and second sentencing hearings provided ineffective assistance of counsel and the court clearly erred finding otherwise. Again, because of inadequate investigation, Taylor argues the court abused its discretion denying his motion for continuance to pursue further investigation.

Taylor argues the trial court's findings are insufficient. We disagree. Taylor alleges the trial court failed to issue findings of fact and conclusions of law on all issues presented, as required by Rule 24.035(i). Taylor claims "it is impossible to tell whether: 1) Judge Messina disbelieved all of the new evidence about appellant's family history and mental state, and therefore thought that their testimony would not have made a difference; 2) Judge Messina did not believe that the new evidence could have been developed by earlier investigation; or 3) Judge Messina believed the witnesses, but did not believe Judge Coburn would have imposed a life sentence even if he had all of the new evidence."

"There is no precise formula to which findings of fact and conclusions of law must conform." *Conway v. State*, 883 S.W.2d 517, 517 (Mo.App.1994) (citing *Short v. State*, 771 S.W.2d 859, 865 (Mo.App.1989)). "Generalized findings are sufficient if they enable the appellate court to meaningfully review the

movant's contentions." *Id.* In over thirty-six pages of findings and conclusions the trial court sufficiently addressed Taylor's concerns and claims. Taylor presented thirteen witnesses, and the trial judge summarized and evaluated the testimony of each witness individually. We find the trial court's findings of fact to be extensive, specific and sufficient to allow proper appellate review.

Taylor presented evidence to the post-conviction relief court that several of his attorneys believed their mitigation investigation was inadequate. A mitigation expert testified of the need for more investigation. On cross-examination, the expert admitted he had not read the entire transcript and record and did not know what evidence had been before the sentencing court. A mitigation investigator testified she had not yet contacted all of the potential witnesses she wished to interview. A medical expert testified a mental health issue required further development. The post-conviction relief court heard from two witnesses who had not previously testified about Taylor's childhood. Taylor argues childhood trauma and possible mental disorder were undeveloped issues affecting mitigation.

The court found,

The general picture that emerges from the post conviction hearing testimony of these thirteen witnesses is basically the same picture that the Court had before it at the second penalty hearing.

The witnesses who have stated that more investigation was needed either for the second penalty hearing or for the post conviction hearing, have been unable to establish through cred-

ible and specific testimony what benefit there would have been to Movant had such time been granted. . . .

The [second penalty hearing] record is replete with mitigation evidence adduced by Movant's counsel. Counsel presented twelve witnesses, and numerous exhibits. Any additional witnesses regarding mitigation evidence would have been cumulative, and Movant has failed to show how he was prejudiced by the alleged failure of counsel to contact additional witnesses. . . .

Movant presented numerous witnesses and exhibits in support of his defense of mental illness and accompanying personality disorders at his sentencing hearing. Further, no credible evidence was presented at the post conviction hearing supporting Movant's position in this regard. Movant has had the benefit of several mental examinations, and the results of those examinations were before Judge Coburn.

We review denial of post-conviction motions to determine whether the court's findings and conclusions are clearly erroneous, in other words, after a review of the whole record, are we left with the definite and firm impression a mistake has been made? *Moore v. State*, 827 S.W.2d 213, 215 (Mo. banc 1992). The court did not find the evidence supporting a need for further investigation to be credible. We respect the motion court's superior ability to determine matters of witness credibility. *State v. Harris*, 870 S.W.2d 798, 814 (Mo. banc), *cert. denied*, 513 U.S. 953, 115 S.Ct. 371, 130 L.Ed.2d 323 (1994). The

court determined further mitigation witnesses would have produced merely cumulative evidence. Upon examination of the record, we do not find these conclusions clearly erroneous.

Taylor claims he was denied effective assistance of counsel because his attorneys failed to further investigate mitigating evidence. Ineffective assistance of counsel exists when counsel fails to use the "customary skill and diligence that a reasonably competent attorney would exercise under similar circumstances, and the failure to exercise such diligence is prejudicial." *Id.* (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984)). We presume counsel to be competent, requiring proof to the contrary by a preponderance of the evidence. *Sanders v. State*, 738 S.W.2d 856, 857 (Mo. banc 1987). Movant must satisfy both the performance and the prejudice prong to prevail. *Id.* If he fails to show prejudice, the court need not evaluate performance. *Id.*

Taylor asserts, "[h]aving found that appellant suffered prejudice from the failure to present mitigating evidence, this court must also find that the failure to investigate mitigating evidence was ineffective assistance of counsel." Far from finding appellant suffered prejudice, we found the motion court did not clearly err deciding further investigation would produce merely cumulative evidence and testimony purporting to show the need for more investigation was not credible. The two witnesses who testified for the first time at the post-conviction relief hearing presented evidence of Taylor's childhood from their perspectives, but did not bring forth any significant fact or incident that had not been before the second sentencing court from other wit-

nesses. The mental health expert refused to make a firm diagnosis, but suggested traumatic stress disorder or dissociative disorder possibilities could exist. Previous examinations by psychologists and psychiatrists had resulted in findings of mental competence and failed to indicate these newly suggested disorders. Counsel cannot be faulted for failing to shop for a psychiatrist who would testify more favorably. *State v. Mease*, 842 S.W.2d 98, 114 (Mo. banc 1992), *cert. denied*, 508 U.S. 918, 113 S.Ct. 2363, 124 L.Ed.2d 269 (1993).

Taylor failed to establish but for counsel's investigation of mitigation there is a reasonable probability he would not have been sentenced to death. The motion court was not clearly erroneous to find Taylor did not receive ineffective assistance of counsel.

In his final point, defendant argues the post conviction court erred by denying his motion for a continuance. The decision to grant or deny a continuance is a matter within the sound discretion of the trial court. *State v. Chambers*, 891 S.W.2d 93, 100 (Mo. banc 1994); *State v. Ervin*, 835 S.W.2d 905, 929 (Mo. banc 1992), *cert. denied*, 507 U.S. 954, 113 S.Ct. 1368, 122 L.Ed.2d 746 (1993).

After defendant filed his pro se Rule 24.035 motion, counsel was appointed on October 27, 1994. Defendant filed an amended 24.035 motion and an evidentiary hearing was scheduled for March 21, 1995. Defendant filed a motion for continuance. The court granted the motion and scheduled the evidentiary hearing for April 24, 1995. Prior to this date, defendant filed a second motion for continuance. The court also granted this motion and scheduled the evidentiary hearing for May 18, 1995. After completing his presentation of evidence on May 19,

1995, defendant argued testimony from a mitigation expert and psychologist indicated additional time was needed for investigation and interviewing witnesses. Defendant asserted the information was relevant to his claim of counsel's inadequate investigation for the penalty phase. The court treated defendant's argument as a motion for continuance and denied the motion.

The post conviction court granted defendant almost two additional months from the original scheduled hearing date. Counsel had represented defendant for more than six months prior to the hearing. *See State v. Wise*, 879 S.W.2d 494, 523 (Mo. banc 1994), *cert. denied*, 513 U.S. 1093, 115 S.Ct. 757, 130 L.Ed.2d 656 (1995). In addition, the post conviction court addressed the testimony of defendant's psychologist and mitigation expert in its findings and conclusions for defendant's Rule 24.035 motion. The court found the witnesses who stated additional time was needed failed to establish through "credible and specific testimony" how the defendant would have benefitted from the additional time. The court also found any additional witnesses testifying as to mitigation would have been cumulative and defendant failed to demonstrate prejudice by the alleged failure of counsel to contact additional witnesses. On this record, the court did not abuse its discretion by denying defendant a third continuance.

VIII.

The judgments are affirmed.

BENTON, PRICE, LIMBAUGH, ROBERTSON AND COVINGTON, JJ., concur.

HOLSTEIN, C.J., dissents in separate filed opinion.

HOLSTEIN, Chief Justice, dissenting.

For the reasons expressed at length in *State v. Nunley*, 923 S.W.2d 911 (Mo. banc 1996), I respectfully dissent.

201a

IN THE SUPREME COURT OF THE
STATE OF MISSOURI

Case No. SC77365

STATE OF MISSOURI,

Respondent,

—v.—

MICHAEL TAYLOR,

Appellant-Movant.

MOTION TO RECALL THE MANDATE

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ATTORNEYS FOR APPELLANT-MOVANT

INTRODUCTION

Appellant and Movant, Michael Anthony Taylor, submits his Motion to Recall this Court's Mandate of August 20, 1996, affirming the judgment and sentence of death issued by the Circuit Court of Jackson County, Missouri. (Exhibit A). The Mandate must be recalled because Mr. Taylor's sentence was imposed in violation of his federal constitutional rights. First, Mr. Taylor was denied his right to a jury decision on punishment as guaranteed by the Sixth Amendment to the United States Constitution. Mr. Taylor requested a jury for sentencing, but the request was denied. In addition, Mr. Taylor was also deprived of his Sixth Amendment right to effective assistance of appellate counsel due to the failure of his appellate counsel to present, to this Court on previous appeal, instances of ineffective assistance by Mr. Taylor's plea counsel. As a result of plea counsel's ineffectiveness Mr. Taylor's guilty plea was not voluntary, and as a result of appellate counsel's failure to present the issues Mr. Taylor has been completely denied review of those deficiencies causing prejudice to Mr. Taylor's case.

* * *

ARGUMENT

I. The Decisions By The United States Supreme Court In *Apprendi* And *Ring* And By This Court In *Whitfield* Require That The Mandate Be Recalled And Mr. Taylor's Sentence Be Modified To Life In Prison Without Opportunity For Parole.

A. The Trilogy Of *Apprendi*, *Ring*, And *Whitfield* Establishes The Constitutional Right Of A Capital Defendant To A Jury For Sentencing.

Prior to the holding in *Ring*, this Court held that the right to a jury on the issue of punishment in a first-degree murder case was "created by statute," and that the defendant had "no constitutional right to have a jury assess punishment." *Taylor*, 929 S.W.2d at 218-19. The holding of the United States Supreme Court in *Ring* demonstrates this Court's prior holding to be incorrect. *Ring* held that the Sixth Amendment guaranties "[c]apital defendants . . . a jury determination on any fact on which the legislature conditions an increase in their maximum punishment." *Ring v. Arizona*, 536 U.S. at 584, 589 (2002). In *Whitfield*, this Court explained that the United States Supreme Court has held "that not just a statutory aggravator, but every fact that the legislature requires be found before death may be imposed must be found by the jury." *State v. Whitfield*, 107 S.W.3d 253, 257 (Mo. banc 2003) ("*Whitfield*"). *Ring* extends the rationale and holding of the earlier decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) ("*Apprendi*") to cases where the state seeks the death penalty, and *Whitfield* applies

Ring to the Missouri statutory scheme. In addition, *Whitfield* extensively considered the retrospective application of *Ring*, and held that the rule of law in *Ring* is retroactive in Missouri. *Whitfield*, 107 S.W.3d at 268-9.

Apprendi examined the right of a criminal defendant, under the Sixth and Fourteenth Amendments, to a "jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *Apprendi*, 530 U.S. at 477 (quoting *United States v. Gaudin*, 515 U.S. 506, 510 (1995)). Mr. Apprendi pled guilty to possession of a firearm for an unlawful purpose and unlawful possession of a prohibited weapon. His sentence was enhanced based on the trial judge's conclusion that the circumstances of the offenses of conviction invoked the New Jersey hate crime statute. The United States Supreme Court held that the defendant was entitled to have a jury decide "any fact that increases the penalty for a crime beyond the prescribed statutory maximum . . . beyond a reasonable doubt." *Apprendi*, 530 U.S. at 491. The State of New Jersey argued unsuccessfully in *Apprendi* that the provisions of the hate crime statute were simply "sentencing factors" and not "elements" of the offense. *Id.* The Court disagreed, stating "the relevant inquiry is not one of form, but of effect—does the required finding expose a defendant to a greater punishment than authorized by the jury's verdict?" *Id.* at 494. In *Ring*, the Court restated *Apprendi*'s core holdings: "[i]f the state makes an increase in the defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the state labels it—must be found by a jury beyond a reasonable doubt." *Ring*, 536 U.S. at 602.

In *Whitfield*, this Court considered the constitutional implications of the capital sentencing procedure established by Mo. Rev. Stat. § 565.030.4 (1994), which directed the trial judge to determine punishment following a jury deadlock on that issue. Mr. Whitfield was tried and convicted of first-degree murder by a jury, but the jury deadlocked in the penalty phase. Under the then existing provisions of § 565.030.4, in the case of a deadlock the judge was required to make the findings of fact required by § 565.030.4 in deciding punishment. The trial judge made those findings and sentenced Mr. Whitfield to death. He appealed the sentence and this Court affirmed. After the United States Supreme Court's decision in *Ring*, Mr. Whitfield filed a motion to recall the mandate of this Court asserting that Mo. Rev. Stat. § 565.030.4 (1994) was unconstitutional due to its direction that a judge make the factual findings necessary to impose death in the case of a jury deadlock. This Court granted the motion, declared the statute unconstitutional, and held that Mr. Whitfield should be re-sentenced to life imprisonment under § 565.040.2 (1994).

Ring and *Whitfield* require that Mr. Taylor's motion be granted. Mr. Taylor labored under a statute with exactly the same effect of the one held unconstitutional in *Whitfield*. Mo. Rev. Stat. § 565.006.2 (1986) vested the sentencing decision exclusively with the trial judge upon a guilty plea and the prosecutor's decision to deny jury sentencing. *Whitfield* determined that the Constitution does not allow a statute to strip a Missouri capital defendant of the right to jury sentencing. Mr. Taylor's sentence cannot be sustained.

B. Missouri Revised Statute § 565.006.2 (1986)
Is Unconstitutional Both On Its Face And As
Applied To Mr. Taylor Because It Denies
Capital Defendants Their Right To A Jury
Sentencing.

As mentioned above, the statute at issue is Mo. Rev. Stat. § 565.006.2 (1986), which provides: "No defendant who pleads guilty to a homicide offense or who is found guilty of a homicide offense after trial to the court without a jury shall be permitted a trial by jury on the issue of the punishment to be imposed, except by agreement by the state." In light of the decisions of the United States Supreme Court in *Apprendi* and *Ring* and of this Court in *Whitfield*, § 565.006.2 is unconstitutional on its face as it violates a criminal defendant's Sixth Amendment right to a jury following a conviction of first-degree murder in cases where the state is seeking the death penalty.

Ring found the first-degree murder statute in Arizona to authorize a maximum penalty of death "only in a formal sense," because a separate statute required certain facts to be found before a defendant was death eligible. 536 U.S. at 604. Missouri has a substantially similar statutory framework, and this Court made the same finding concerning Missouri law in *Whitfield* that the United States Supreme Court made in *Ring*. *Whitfield* considered the four-step fact finding process necessary to impose a death sentence in Missouri and held—in accordance with *Ring*—that a jury rather than a judge must go through the statutory steps and determine the facts on which the death sentence is based. 107 S.W.3d at 262. Currently, § 565.006.2 contravenes the rule established in *Whitfield* in cases where the defen-

dant pleads guilty to first-degree murder absent an agreement with the prosecution for jury sentencing. On its face, § 565.006.2 purports to grant the state the power to deprive capital defendants of their constitutional right to jury sentencing following a guilty plea. The statute cannot be constitutionally enforced.

In addition, § 565.006.2 is unconstitutional as applied to Mr. Taylor. This Court found that because the prosecutor did not make an offer of jury sentencing to Mr. Taylor, he had no right under § 565.006.2 to jury sentencing. *Taylor*, 929 S.W.2d at 217. Therefore, the Court held that the failure of the trial-court judge or defense counsel to notify Mr. Taylor of the jury sentencing option did not affect the voluntary nature of Mr. Taylor's guilty plea, nor did the denial of his request for jury sentencing after the remand by this Court result in any constitutional violation. Following *Ring-Whitfield*, it is clear that those rulings were in error. Based on Mo. Rev. Stat. § 565.006.2 (1986), the State impermissibly denied Mr. Taylor the right to jury sentencing granted to him by Mo. Const. art. I, §§ 10, 18(a), 21 & 22(a), and the Sixth and Fourteenth Amendments.

C. Mr. Taylor Did Not Waive His Right To Jury Sentencing.

The Missouri Constitution and Rule 27.01(b) require that a defendant's waiver of a jury must appear from the record with unmistakable clarity. *State v. Bibb*, 702 S.W.2d 462, 466 (Mo. banc 1985). There was no explicit waiver by Mr. Taylor of his right to sentencing by a jury at any stage of the proceedings. Moreover, neither the court nor defense counsel recognized or acted on any right to jury sentencing or any issue of explicit waiver of that right

at any stage of these proceedings. In fact, Mr. Taylor requested a jury for resentencing and appealed the denial of that request. (Exhibit D, pgs. 60-61).

In its decision on Mr. Taylor's consolidated appeal in 1996, this Court explicitly held that Mr. Taylor had not waived sentencing by a jury. *Taylor*, 929 S.W.2d at 217-19. On appeal, Mr. Taylor argued that his guilty plea was not knowingly made because he was unaware of the possibility of jury sentencing if the prosecution consented under § 565.006.2. (Exhibit D, pgs. 55-56). In rejecting Mr. Taylor's argument this Court stated:

Jury sentencing after a guilty plea is not a right for the defendant to waive, rather a privilege for the State to grant. **Taylor did not waive sentencing by a jury** because he could only obtain jury sentencing if the State agreed to it. The State did not agree; therefore, there was nothing of which to inform him.

Taylor, 929 S.W.2d at 217 (emphasis added).

This Court emphasized its "no waiver" conclusion when addressing the topic of the trial court's refusal to allow Mr. Taylor a jury on re-sentencing. The Court stated that Mr. Taylor was not entitled to a "new jury" for the imposition of punishment because **"he never obtained nor possessed the right to a jury for imposition of punishment . . ."** *Id.* at 219 (emphasis added). Respondent cannot argue that Mr. Taylor waived jury sentencing in light of this Court's explicit holding otherwise.

D. The Failure Of The State To Afford Mr. Taylor His Sixth Amendment Right To A Jury Sentencing Is Not Harmless Error.

The constitutional violations in Mr. Taylor's case are not harmless error. In *Whitfield*, this Court interpreted *Ring* as implying that "a court may find that the failure to require jury findings was harmless error." *Whitfield*, 107 S.W.3d at 262 (citing *Ring* 536 U.S. at 609, n. 7). The *Whitfield* Court also held that federal constitutional errors are examined on a "harmless beyond a reasonable doubt" standard. *Whitfield*, 107 S.W.3d at 262. "Under this test . . . the state must 'prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Id.* Respondent cannot surmount that standard here.

As noted above, under the Missouri death penalty sentencing criteria, the jury¹ is required to sentence a capital defendant to life imprisonment unless the jury: (1) unanimously finds at least one statutory aggravator; (2) unanimously finds that the factors in aggravation warrant the imposition of a death sentence; (3) unanimously finds that the evidence in mitigation of punishment does not outweigh the aggravating evidence; and (4) unanimously finds under all the circumstances that death is the appropriate penalty. This last factor makes it the jury's prerogative to issue a sentence of life in prison no matter how they balance the other factors. *State v. Mayes*, 63 S.W.3d 615, 637 (Mo. 2001); cf. *State v. Finch*, 975 P.2d 967, 1007-08 (Wash. 1999) (en banc),

¹ As discussed, under *Ring* the "trier" must be a jury in the absence of an explicit waiver of the jury right. No such waiver is present in this case, so the "trier" is referred to here as the "jury."

cert. denied, 528 U.S. 922 (1999) (finding that there is no such thing as “overwhelming evidence” of the death penalty because although there can be objective evidence of a person’s guilt or innocence such that a reviewing court can say whether a trial jury’s deliberations would have come out the same way as to the underlying offense, aggravating and mitigating factors are “of a more subjective nature . . .”).

Mr. Taylor presented substantial mitigation evidence at both his sentencing and post-conviction relief (“PCR”) hearings. *Taylor*, 929 S.W.2d at 223-225; (Exhibit G, pgs. 35-131; 274-304; 313-324); (Exhibit I, pgs. 132-299). This Court cannot say with certainty that a jury would not have believed the mitigating evidence to warrant a sentence of life in prison. Further, this Court cannot predict how a jury, freed of any mechanistic obligation of balancing, would have decided the fourth factor. The Court cannot determine beyond a reasonable doubt that a jury would have rendered a death sentence in *Taylor* and, as a result, the sentence of death imposed in *Taylor* must be vacated.

E. Mr. Taylor’s Death Sentence Is Unconstitutional, Therefore, Under Missouri Revised Statute § 565.040.2, He Must Be Re-Sentenced To Life Imprisonment.

The Missouri statutory scheme is explicit concerning the relief required to be granted when a death sentence is held to be unconstitutional. Mo. Rev. Stat. § 565.040.2 provides, in pertinent part:

“In the event that any death sentence imposed pursuant to this chapter is held to be unconstitutional, the trial court which previously sen-

tenced the defendant to death shall cause the defendant to be brought before the court and shall sentence the defendant to life imprisonment without eligibility for probation,. parole or release except by act of the Governor. . . .”

Mo. Rev. Stat. § 565.040.2 (1999). Mr. Taylor must be re-sentenced to life imprisonment.

* * *

CONCLUSION

Mr. Taylor has been denied his constitutional rights to jury sentencing and to effective assistance of counsel due to an unconstitutional state statute and actions of the State. This Court should withdraw its Mandate.

Respectfully submitted,

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Attorneys for Appellant-Movant

CERTIFICATE OF SERVICE

I hereby certify a true and correct copy of the foregoing was deposited in the mail, first-class postage prepaid, this 22nd day of March, 2005, to:

Stephen D. Hawke, Esq.
Assistant Attorney General
P. O. Box 899
Jefferson City, Missouri 65102

/s/ DANIELLE A. CURTISS
ATTORNEY FOR APPELLANT-MOVANT

213a

[LETTERHEAD OF CLERK OF THE SUPREME COURT
STATE OF MISSOURI]

May 31, 2005

Mr. Mark A. Thornhill
Ms. Danielle A. Curtiss
Suite 1400
1000 Walnut Street
Kansas City, Missouri 64106-2140

In re: State of Missouri, Respondent, vs. Michael
Taylor, Appellant. Missouri Supreme Court No.
SC77365

Dear Counsel:

Please be advised that the Court entered the fol-
lowing order on this date in the above-entitled
cause:

“Appellant’s motion to recall the mandate over-
ruled.”

Very truly yours,

THOMAS F. SIMON

/s/ KATHY K. FLETCHALL

Kathy K. Fletchall

Deputy Clerk, Court en Banc

cc: Ms. Elizabeth U. Carlyle
Mr. Stephen D. Hawke

IN THE SUPREME COURT OF MISSOURI

No. SC77365

STATE OF MISSOURI,

Respondent

—vs.—

MICHAEL A. TAYLOR,

Appellant.

MOTION TO RECALL THE MANDATE

COMES NOW Appellant, Michael Anthony Taylor, by and through counsel, Robert W. Lundt, and respectfully moves this Court to recall the Mandate this Court issued in *State v. Taylor*, 929 S.W. 2d 209 (Mo. banc. 1996). Mr. Taylor moves this Court to issue in its stead a Mandate reversing Mr. Taylor's sentence of death and directing the trial court to impose a sentence of life imprisonment without eligibility of probation or parole. In the alternative, Mr. Taylor requests this Court to order a new penalty phase with the death eligibility factual determina-

tions to be made by a jury.¹ As grounds for this motion, Mr. Taylor states that the opinion in *State v. Taylor, supra*, is in conflict with subsequent United States Supreme Court decisions in the cases of *Blakely v. Washington*, 542 U.S. 296 (2004), *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Ring v. Arizona*, 536 U.S. 584 (2002), and the Sixth and Fourteenth Amendments to the United States Constitution. Section 565.006.2 RSMo. is unconstitutional because it denies a defendant who pleads guilty to a capital offense the Sixth Amendment right to a jury determination of the facts making him eligible for the death penalty. Additionally, Section 565.006.2 RSMo was unconstitutionally applied to Mr. Taylor when, after he specifically requested a jury, he was denied jury fact-finding on the determination of facts that would make him eligible for the death penalty after he specifically requested a jury.² Under *State v. Whitfield*, 107 S.W.3d 253, 268 (Mo. banc 2003) and *Danforth v. Minnestoa*, __ U.S. __, 128 S.Ct. 1029 (2008), the holding of the *Blakely* case should be retroactively applied in Missouri to give Mr. Taylor relief. Section 565.040.2 entitles Mr. Taylor to a life sentence because his death sentence was unconstitutionally imposed.

¹ The State will argue that this issue has already been ruled upon by this Court on May 31, 2005, but the Motion to Recall the Mandate filed on April 1, 2005 contained claims that Mr. Taylor was entitled to *sentencing by a jury*. In contrast, this motion alleges that Mr. Taylor is entitled to a factual determination of death eligibility by a jury pursuant to the United States Supreme Court case of *Blakely v. Washington*, 542 U.S. 296 (2004).

* * *

Basis for recalling the mandate

Michael Taylor was sentenced to death by a judge who made the fact findings required to establish eligibility for a sentence of death despite that Mr. Taylor clearly invoked his right to have a jury make those factual findings. No a jury ever unanimously found the facts necessary to make Mr. Taylor eligible for the death penalty pursuant to §565.030 RSMo as required by the Sixth and Fourteenth Amendments to the United States Constitution.⁵ The Missouri Supreme Court opinion in *State v. Taylor*, 929 S.W. 2d 209 (Mo. banc. 1996) upholding this result conflicts with the United States Supreme Court's holdings in *Blakely*, *Ring* and *Apprendi* and the Sixth and Fourteenth Amendments to the United States Constitution.

SECTION 565.006.2 IS UNCONSTITUTIONAL

Section 565.006.2 RSMo. is the statute that allows an individual to waive his right to a trial and enter a guilty plea in a capital case. It has remained unchanged since enacted in 1983. The section provides that no defendant who pleads guilty to a capital offense "shall be permitted a trial by jury on the issue of punishment to be imposed, except by agreement of the state." It does not give any rights to the defendant but gives the State alone the right to determine whether a jury can be the fact-finder after

⁵ Mr. Taylor's capital case was subject to the Missouri Revised Statutes of 1986, prior to the current amendments to §565.030.4 which removed the "warrant" step.

a guilty plea to murder in the first degree. Under the statute, a defendant may request a jury to determine the facts necessary to make a defendant eligible for the death penalty but this is possible only upon acquiescence by the State.

Section 565.006.2 RSMo. violates the Sixth Amendment which gives defendant right to jury as fact-finder in penalty phase

As explicitly stated by the United States Supreme Court in *Ring v. Arizona*, 536 U.S. 584, 589, 122 S. Ct. 2428, 2442 (2002), "The Sixth Amendment requires that [aggravating factors] be found by a jury." As the Court noted, "The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact finding necessary to increase a defendant's sentence by two years but not the fact finding necessary to put him to death. We hold that the Sixth Amendment applies to both." 536 U.S. at 609, 122 S. Ct. at 2243.⁶ The *Ring*, Court applied the holding in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000), to capital punishment cases.

In the instant case, no jury made the factual findings necessary to render Mr. Taylor death-eligible. No jury found the existence of any aggravating factors, no jury found that the evidence in aggravation of punishment warranted imposing the death sentence, no jury found that the evidence in mitigation of punishment was not sufficient to outweigh the

⁶ Justice Breyer concurring in the judgment in *Ring*, went even further stating: "... the Eighth Amendment requires individual jurors to make, and to take responsibility for, a decision to sentence a person to death." 536 U.S. at 619. (Breyer, J., concurring in the judgment).

evidence in aggravation of punishment, and no jury found that under all of the circumstances it was appropriate to assess and declare the punishment of death. All of those findings are required by §565.030 to make a defendant eligible for the death penalty, and the *Ring* Court clearly held that there is a Sixth Amendment right to a unanimous, beyond a reasonable doubt jury verdict on each of those factual issues.

Blakely gives defendants who plead guilty such as Mr. Taylor the right to a jury determination of any facts used to enhance his sentence, independently of his right to a jury trial

The *Blakely* case is the culmination of a gradual shift in United States Supreme Court jurisprudence interpreting the Sixth Amendment. In the landmark case, *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000), the Court determined that "... any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. Apprendi pled guilty to firearms charges and a New Jersey hate crime statute that allowed the sentencing judge to increase the maximum sentence by finding that the defendant acted with the purpose to intimidate a protected group. *Id.* at 470. The Court reasoned that where a statute has a mechanism that serves to increase the punishment beyond the standard limits for an offense; that mechanism is not merely a sentencing consideration, but a factual determination that invokes Sixth Amendment protections. *Id.* at 495. Thus, the Court held that the Sixth Amendment required a jury to

determine beyond a reasonable doubt the factual basis for enhancing Apprendi's penalty.

In, *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428 (2002), the United States Supreme Court expanded Sixth Amendment protections to include statutory mechanisms for death penalty eligibility. In Arizona, as in Missouri, without the statutory mechanism to enhance the sentence, a defendant's maximum penalty for a capital murder conviction is life without the possibility of parole. Reasoning that the presence or absence of aggravating circumstances and mitigating circumstances must be factually determined to enhance a defendant's sentence to death, the Court found that Sixth Amendment protections necessarily apply. Therefore, Ring was constitutionally entitled to have a jury determine the facts upon which he became eligible for the death penalty and those facts must be proved to the jury beyond a reasonable doubt. *Id.* at 609.

The United States Supreme Court further explained a defendant's constitutional entitlement to a trial by jury regarding facts that would enhance the penalty after a guilty plea in *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004). Blakely pled guilty to second degree kidnapping involving domestic violence and the use of a firearm under the state of Washington's criminal code. *Id.* 299. He did not admit to facts that would enhance his punishment under a Washington statute that allowed a judge to exceed the maximum for the offense of kidnapping. *Id.* After a three-day hearing, the judge found that Blakely "acted with 'deliberate cruelty'" under the statute and gave him more than three years in excess of the plea agreement. *Id.* at 300. Blakely appealed arguing that the plea court

violated his constitutional right to have a jury determine beyond a reasonable doubt the facts necessary to enhance his sentence. *Id.* at 301. The Washington State Court of Appeals disagreed with *Blakely* and the Supreme Court of Washington denied review. *Id.*

The United States Supreme Court found that since *Blakely* did not admit to facts that would enhance his sentence beyond the facts for the underlying offense, the judge lacked the power to sentence him under Washington's enhancement statute. *Id.* at 305. The Sixth Amendment limits a judge's authority to sentence a defendant on any aggravating fact that is not proven to a jury beyond a reasonable doubt. *Id.* The Court held, "When a defendant pleads guilty, the State is free to seek judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or consents to judicial fact finding." *Id.* at 310. This constitutional right to a jury determination of enhancing facts was deemed independent of the right to a jury trial on the issue of guilt or innocence. *Id.* The Court reasoned, "As *Apprendi* held, every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment." *Id.* at 313 (emphasis in original).

Missouri's statutory mechanism denies defendants who plead guilty to a capital murder the right to insist on jury fact-finding, as guaranteed by the Sixth Amendment. It thus conflicts with *Ring*, *Apprendi* and *Blakely*. Section 565.006.2 RSMo., in direct conflict with *Blakely* states, "No defendant who pleads guilty to a homicide offense or who is found guilty after a trial to the court without a jury shall be permitted a trial by jury on the issue of punishment to be imposed, except by agreement of the

state." The statute permits a defendant a jury trial only upon agreement of the State. The defendant's constitutional right is therefore contingent upon the State's generosity. In conflict with *Blakely*, *Ring* and *Apprendi*, § 565.006 RSMo. denies a defendant who wishes to plead guilty to a capital case his right to a jury determination of the facts that would make him eligible for the death penalty and is therefore unconstitutional.

When Mr. Taylor pled guilty in 1991 pursuant to §565.006 RSMo., he was denied the right to a jury for the determination of facts required to enhance his sentence to death. As this Court held in 1996, "As is obvious from the language of the statute, jury sentencing after a guilty plea is not a right for the defendant to waive, rather a privilege for the State to grant. Mr. Taylor did not waive sentencing by a jury because he could only obtain jury sentencing if the State agreed to it." 929 S.W.2d 209, 217. This Court's holding was in clear conflict with United States Supreme Court holdings in *Blakely*, *Ring* and *Apprendi*.

Blakely's teachings lead to the conclusion that Section 565.006.2 RSMo. is unconstitutional because it states that a defendant upon pleading guilty to a judge, unless the State agrees to a jury tried penalty phase, is not entitled to a jury determination of the facts upon which eligibility for the death penalty will be found.

Colorado's statutory death penalty scheme is very similar to the one employed in Missouri, as this Court explained in *State v. Whitfield*, 107 S.W.3d 253, 259 (Mo banc. 2003). Therefore, Colorado's approach to an identical issue arising under Colorado statutes issue is instructive.

In *People v. Montour*, 157 P.3d 489 (Co. banc. 2007), the Supreme Court of Colorado invalidated Colorado's capital plea statute on facts similar to those presented here. Montour pled guilty to murder under a state statute providing that upon a plea of guilty, a capital defendant automatically waives his right to a determination of facts enabling the court to sentence him to death. *Id.* 490. Colorado, like Missouri's §565.035 RSMo., has a statute that gives the Supreme Court the ability to independently review all death sentences. The Supreme Court of Colorado, using this statutory jurisdiction, reviewed Montour's sentence and the statute under which he pled guilty. *Id.*

Montour, pled guilty to a capital murder charge pursuant to a statute which required him to also waive his right to a jury determination of facts that made him eligible for the death penalty. *Id.* Like Mr. Taylor, Montour repeatedly told the circuit court that he understood that by pleading guilty to a capital murder charge he was waiving his right to jury sentencing pursuant to the statute. *Id.* at 494. The Colorado Supreme Court held, "Once a capital defendant enters a guilty plea, he retains the Sixth Amendment right to jury sentencing on the facts essential to the determination of death eligibility." *Id.* 498. The Court invalidated the statute that linked a plea of guilty to an automatic waiver of jury sentencing. *Id.* The Colorado Court found that the United States Supreme Court in "*Blakely* established the right to a jury trial during sentencing on all facts essential to punishment as a right independent from the right to a jury trial on the issue of guilt." *Id.* at 497, citing *Blakely*, 542 U.S. 296, 301-05, 124 S.Ct. 2531.

The Blakely holding has retroactive effect in Missouri

This Court in *State v. Whitfield*, 107 S.W.3d 253, 268 (Mo. banc 2003) decided that the United States Supreme Court holding in *Ring* would be applied retroactively in Missouri. *Id.* at 269. Since the holding in *Blakely* was based on the same Sixth Amendment grounds as both *Ring* and *Apprendi*, it follows that *Blakely* would be applied retroactively as well, by applying the *Linkletter-Stovall* analysis this Court used in *Whitfield*. *Id.* at 266, citing, *Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731 (1965), and *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967 (1967).

First, in applying *Linkletter-Stovall*, the Court must consider "the purpose to be served by the new rule." *Id.* at 268. Here, the purpose of *Blakely* is to ensure that the defendant's Sixth Amendment right [sic] a jury determination of the facts necessary to make him eligible for the death penalty stands independent of his right to a jury trial on the issue of guilt. The United States Supreme Court deemed this right to be a natural extension of the holding in the *Ring* case. *Id.* at 303.

Second, in applying *Linkletter-Stovall*, the Court must consider "the extent of reliance by law enforcement on the old rule." *Id.* Again, the analysis is similar to the *Whitfield* case. Applying the *Blakely* holding in Missouri will not force any alterations in law enforcement techniques or preclude the use of any evidence at trial.

Third, in applying *Linkletter-Stovall*, the Court must consider "the effect on the administration of justice of retroactive application of the new standards." *Id.* As the *Whitfield* Court noted, Missouri has always favored jury trials where the defendant's

life is at stake. *Id.* at 268. The Court held, “the right asserted is the fundamental right to trial by jury and . . . the stake is of the highest magnitude—the defendant’s life.” *Id.* at 267. Applying the *Blakely* holding retroactively will only affect those cases where the defendant has pled guilty on a capital case and been denied a jury trial on the factual elements for sentencing.⁷

This Court reasoned in *Whitfield* that the high court’s new interpretations of constitutional procedure do not require that state courts reach back to cases already final when the new interpretation was announced. *Whitfield* at 265. However, the Court chose to apply *Linkletter-Stovall* because the right to a jury trial is fundamental and the stakes are the highest in capital cases. *Id.* at 267. The United States Supreme Court agreed with this interpretation, in *Danforth v. Minnesota*, __ U.S. __, 128 S.Ct. 1029 (2008) holding that State Courts are free to give broader effect to new constitutional rules of criminal procedure than the high court. *Id.* 1032. Since the constitutional rights abridged are the same here as in *Whitfield*, pursuant to *Linkletter-Stovall* analysis, the *Blakely* holding should be applied retroactively in Missouri, rendering guilty pleas entered under Section 565.006.2 unconstitutional.

⁷ Should this Court grant relief on the basis requested, the only other cases that may be affected are the co-defendant, Roderick Nunley, and Michael Worthington, a miniscule number of Missouri death row inmates.

SECTION 565.006.2 WAS UNCONSTITUTIONALLY APPLIED TO MR. TAYLOR

Even if the Court deems this statute not to be facially unconstitutional, §565.006.2 was unconstitutionally applied to Mr. Taylor's case because he did not knowingly, intelligently and voluntarily waive his Sixth Amendment right to a jury determination of death eligibility facts.

Waiver issues

Mr. Taylor cannot be deemed to have waived his Sixth Amendment right to a jury determination of facts that would make him eligible for the death penalty for three reasons: First, he was informed in 1991 that his the [sic] plea of guilty had the automatic effect of waiving his rights. Second, in 1991 he was not informed that, if the State agreed, he could have jury sentencing. And third, upon remand in 1994, he requested a jury trial for sentencing phase but his request was denied. For each of these reasons, individually and cumulatively, Mr. Taylor cannot be deemed to have waived his Sixth Amendment right to a jury determination of the facts making him eligible for the death penalty.

As to the first reason, in 1991, Judge Randall and Mr. Taylor's attorney, Martin McClain, made it abundantly clear that by pleading guilty, Mr. Taylor was automatically waiving his right to a jury in both phases of his capital case. McClain questioned Mr. Taylor, "Do you understand that if you plead guilty it will be up to the Judge to decide the sentence on all charges." (G.P. Tr. 8) "... do you understand that the Judge can give you the death sentence?" (G.P. Tr. 9) "You know that if you plead guilty the state is going

to ask for the death sentence and the Judge could impose death?" (G.P. Tr. 19). Mr. McClain went even further in explaining his understanding: "Do you understand, Michael, that there would still be a sentencing hearing where the state would be presenting evidence, and we on your behalf will be presenting evidence to the Judge as to what sentence to propose on the Murder Charge?" (G.P. Tr. 20). At no point during his plea of guilty was Mr. Taylor given an option of a jury determination of the facts that would qualify him for the death penalty.

As discussed above, the Colorado Supreme Court dealt with the issue of waiver in the *Montour* case as well. *Id.* at 500. Despite that Montour waived a jury in the circuit court, the Colorado Supreme Court found, "as a matter of law that Montour's waiver could not have been knowing, voluntary and intelligent because his waiver was inflicted with the same constitutional infirmity [as the statute]—his waiver was inextricably linked to his guilty plea." *Id.* at 500.

Mr. Taylor's initial plea in 1991 was similarly constitutionally infirm. Just like Montour, Mr. Taylor's waiver could not have been knowing, voluntary and intelligent. Like the Colorado statute, Missouri's statute, §565.006.2 denies a defendant a jury to be empanelled for factual determination of death eligibility. By operation of the statute Mr. Taylor's waiver of that factual determination by a jury was inextricably linked to his decision to plead guilty. Because Mr. Taylor had no choice, he made no voluntary, knowing and intelligent Sixth Amendment waiver at this juncture.

As to the second reason he could not have waived his Sixth Amendment right, Mr. Taylor was never

informed of the possibility that a jury could be empanelled for this purpose even by agreement of the State. Mr. Taylor has consistently asserted that he was never informed of his options concerning a jury. (PCR Tr. 602). Lead trial attorney Marty McClain testified at the first postconviction hearing about this issue:

Q: And can you tell me if today you are available or you are aware of this Missouri statute, 565.006, about the procedure for guilty plea and the mechanism of jury sentencing after that?

McClain: My recollection at the time was I was under the—I mean, I recall looking at the statute and I recall understanding that the choice was between a full jury trial on both guilt and penalty phase and pleading guilty and having the judge do sentencing. That's my recollection.

Q: Okay. Did you ever talk to Michael Taylor prior to the attempt to enter a plea of guilty in front of Judge Meyers about what I'm now describing to you as the third option, pleading guilty to a Judge and seeking a jury for sentencing?

McClain: No, I did not talk to Michael about that.

Q: And is it your testimony that you were unaware of that as a potential statutory procedure?

McClain: That's correct, I do not recall of having any knowledge of that.

(PCR Tr. 91).

Although preservation is not an issue because this involves a constitutional right, Mr. Taylor continued to raise this issue in his first consolidated appeal to this Court. See, *Arizona v. Fulminante*, 499 U.S. 279 (1991). In Point IV he stated, "The trial court erred in not granting appellant a retrial where appellant was not advised of all his rights to have a jury involved and when waiver of such right must appear of record pursuant to Rule 27.01(b) which did not occur. This deprived appellant of his state and federal constitutional right to trial by jury." (ConsAPP1 62). By summary order, this Court overturned and remanded for a new sentencing hearing. Thus, this and Mr. Taylor's other issues were not specifically addressed. Again, Mr. Taylor did not waive his Sixth Amendment rights at this juncture.

As to the third reason he could not have waived his Sixth Amendment right, Mr. Taylor specifically requested a jury trial upon remand in 1994. After Judge Coburn refused to allow Mr. Taylor to withdraw his guilty plea, the judge ruled that he was not entitled to a jury. This Court determined on his second consolidated appeal that Mr. Taylor was not entitled to jury sentencing because the State did not agree to empanel a jury under Section 565.006.2 RSMo, *State v. Taylor*, 929 S.W.2d 209, 218 (Mo. banc 1996).

This case presents a more egregious situation than that in *Montour*. Distinct from *Montour's* situation, Mr. Taylor even requested a jury trial for his second penalty phase (Second LF 111-113). Despite that specific request, Mr. Taylor was again denied his constitutional right to a jury determination of the facts that would make him eligible for a death sentence. Regardless of whether his actions in 1991

could be deemed a waiver of his right to a jury trial, he clearly requested and was denied his constitutional right to a jury trial upon resentencing in 1994.

In arguing against Mr. Taylor's first motion to recall the mandate, the State asserted that he waived his rights to jury sentencing during his plea in 1991 and that should trump his clear request for jury sentencing upon remand in 1994. The State will most likely take the same position here. Even were this Court to determine that a waiver under §565.006.2 could be constitutional, it would not be constitutional as applied to this case because Mr. Taylor did not knowingly, voluntarily, and intelligently waive his right.

This Court held in 1996 that Mr. Taylor did not have a right to a jury upon remand because, by statute, he never had that right. 929 S.W.2d at 219. Therefore, this Court reasoned, it was of little consequence that Mr. Taylor's plea attorneys did not inform him that there was a possibility of a jury trial with the State's permission because Mr. Taylor could not waive a right he never had. *Id.* The Court's line of reasoning directly conflicted with the United States Supreme Court holding in *Blakely*. Mr. Taylor's Sixth Amendment right to a jury determination of death eligibility facts existed independent of any statutory construction and the failure to inform him of his constitutional right meant that he could not knowingly, intelligently, and voluntarily relinquish it.

Mr. Taylor's sentence of death was imposed in violation of the Sixth and Fourteenth Amendments to the United States Constitution.

The constitutional error is not harmless

This Court held in the *Whitfield* case that a violation of *Ring* may require a harmless error analysis. *Whitfield*, 107 S.W.3d 253, 262. The State bears the burden of proving beyond a reasonable doubt that the constitutional error did not contribute to the verdict. *Id.* citing, *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824 (1967). The State cannot meet that burden here. Under §565.030.4 RSMo., the jury in penalty phase must make four separate factual findings before making the decision to impose the death penalty.⁸ A jury's decision against the State on any of these steps would compel a life in prison without the possibility of parole verdict.

In Step 1, the trier of fact must find the presence of one or more aggravating factors. Certainly the kidnapping, rape and murder of a fifteen year of [sic] girl awaiting her bus could supply one or more statutory aggravators.⁹ Although, Mr. Taylor has no prior murder convictions or serious assaultive convictions that would make this step 'Apprendi exempt,' referring to the holding in *Apprendi* that prior convictions may be found by a judge rather than a jury without violating the Sixth Amendment. See, *Whitfield* at 262. Given the fact that two judges were able to agree on five aggravators, this Court could accept harmless error on this step. The analysis does not end here, however.

⁸ Mr. Taylor's case was subject to the Missouri Revised Statutes of 1986, prior to the current amendments to §565.030.4 which removed the "warrant" step.

⁹ This Court found the facts according to Mr. Taylor's plea testimony, confession and the evidence from the second penalty phase, 929 S.W.2d at 213.

In Step 2, a jury would have to decide beyond a reasonable doubt whether the aggravating circumstances were sufficient to warrant the imposition of the death penalty. As this Court stated in *Whitfield*, this step is "a much more difficult issue for the State." *Id.* at 263. The jury must consider all of the evidence in the case. Asking this Court to believe beyond a reasonable doubt that a jury would necessarily make a constitutionally mandated factual finding required for the imposition of the death penalty is an extremely difficult hurdle for the State to make. *Id.*

Even though Mr. Taylor admitted to raping and participating in the stabbing, at this step, the jury would take into account the additional facts that he was not the primary actor in the case. The evidence would show that Roderick Nunley was older than Mr. Taylor (2d Pen. Tr. 400). Nunley asked Mr. Taylor to stop the car so he could snatch a purse (G.P. 22). The crime was supposed to be a purse snatching but Nunley grabbed the victim (2d Pen. Tr. 212). Nunley was known to be a drug dealer and murderer (2d Pen. Tr. 400). Nunley blindfolded the victim and was worried that she could identify him (2d Pen. Tr. 248). Nunley had Mr. Taylor drive to Nunley's house (2d Pen. Tr. 185, 206). Nunley removed the victim's clothing and was the first one to rape her (2d Pen. Tr. 212, 214). Nunley decided to kill her although Mr. Taylor wanted to let her go (2d Pen. Tr. 230). Mr. Taylor wouldn't kill the victim and stabbed her only after she had already died (2d Pen. Tr. 230, 248). Nunley wanted to make sure that Mr. Taylor was implicated so he wouldn't be standing alone in the murder (2d Pen. Tr. 234). Nunley had been implicated in at least two other murders (2d Pen. Tr. 235,

236). Nunley psychologically dominated Mr. Taylor (PCR2. TR. 226). While the crime was heinous, Mr. Taylor's participation could be seen by a jury of twelve individuals as undeserving of the death penalty because of his relatively minor participation, the domination of him by the much more involved and older actor, and because of his desire that the victim be allowed to go free.

In Step 3, a jury would be asked to unanimously find if the mitigating circumstances were sufficient to outweigh the aggravating circumstance or circumstances. This is a very difficult step for the State to prove harmless error because the jurors do not have to unanimously agree on a single mitigating circumstance this step. Each juror may be convinced by a different mitigating circumstance. Therefore, if the defense can convince the jury that the combination of the mitigating circumstances outweighs the aggravating circumstance or circumstances, the defendant must be sentenced to life in prison. *Id.*

Mr. Taylor has considerable mitigation evidence. He grew up in a very poor and deprived household (PCR2. TR. 386, 387) Mr. Taylor's I.Q. is low and he has a 23 point discrepancy between his performance and verbal IQ (2d Pen. Tr. 547, 666). When he was only 17 years of age, he got mixed up with Nunley, who lead Mr. Taylor into criminal activity and taught him burglary (2d Pen. Tr. 399, 401). He suffers from PTSD which he developed after, at age five, seeing his father accidentally shoot himself and after finding a family friend who had been killed in the neighborhood (2d Pen. Tr. 524, 531). Mr. Taylor also suffers from ADHD (2d Pen. Tr. 531). He suffers from long term drug abuse and was binging at the time of the murder (2d Pen. Tr. 339). He has brain

damage in the left temporal brain damage due to the many traumatic brain injuries he sustained as a child (2d Pen. Tr. 663). From 1969 to 1979 he was admitted to the emergency room, strongly indicating that he was the subject of repeated physical abuse in the home (2d Pen. Tr. 673).

In the second postconviction action, additional mitigation evidence was adduced that a jury should have heard and that would have led to a life without parole verdict. Mr. Taylor's father was an abusive alcoholic (PCR2. TR. 50-67) and his mental illness led him to attempt suicide, something previously described as an accident (PCR2. TR. 59-62). Mr. Taylor's cousin, Norman Taylor, was present when Mr. Taylor found the body of a neighbor and Norman described the horrific incident (PCR2. TR. 96-97). Mr. Taylor's sister, Wanjalette Brown, spoke about the family dysfunction; including their father's drinking and suicide attempt (PCR2. TR. 78-80).

Mr. Taylor was sexually abused by a babysitter when he was about five years old (PCR2. Tr. 125). Clintina Marie Butler testified that she and her sister Kay babysat Mr. Taylor when he was little (PCR2. TR. 313-315). Clintina witnessed Kay sucking Mr. Taylor's penis (PCR2. TR. 313-315).

Several doctors found that Mr. Taylor suffered from mental disease or defect. Dr. Patricia Fleming testified at the first penalty phase that Mr. Taylor suffered from attention deficit-hyperactivity disorder and psychoactive substance abuse (Pen. Tr. 223-224). Dr. Daniel Cuneo testified at the second penalty phase hearing that Mr. Taylor suffered from post-traumatic stress disorder, attention deficit hyperactivity disorder and alcohol and drug dependence (2d Pen. Tr. 537). The interaction of these sig-

nificant disorders made Mr. Taylor to be unable to appreciate the wrongfulness of his actions at the time of the offense (2d Pen. Tr. 537). Dr. Cuneo also found that the twenty-three point difference between Mr. Taylor's verbal and performance I.Q.s indicated the need for neurological testing (2d Pen. Tr. 547-548).

Later, at the second penalty phase hearing, Dr. Jonathon H. Pincus would confirm Dr. Cuneo's suspicions that Mr. Taylor suffers from neurological impairments (2d Pen. Tr. 663). Dr. Pincus noted the enormous difference between the verbal and performance sections of Mr. Taylor's I.Q. testing indicated brain damage (2d Pen. Tr. 663). A SPECT scan of Mr. Taylor's brain confirmed Dr. Pincus's diagnosis, showing the damage Mr. Taylor has sustained to the left temporal lobe (2d Pen. Tr. 655). Dr. Pincus also found that Mr. Taylor suffered from brain damage in the frontal lobe of his brain (2d Pen. Tr. 670). Mr. Taylor's documented medical history demonstrates the many head injuries that could have caused the brain abnormalities that Dr. Pincus discovered (2d Pen. Tr. 671-676). Dr. Pincus testified that the areas of Mr. Taylor's brain that suffered damage decreased his capacity to control impulses (2d Pen. Tr. 682). Dr. Pincus linked Mr. Taylor's brain damage with his psychiatric illnesses, his victimization as a child and his drug abuse to conclude that he was unable to control impulses at the time of the crime (2d Pen. Tr. 677-682).

Also at the second penalty phase hearing, Dr. Roger W. Sommi, Jr. testified to the further impairment that drugs caused Mr. Taylor on the night of the crime (2d Pen. Tr. 334-352). Mr. Taylor ingested intoxicating substances for an extended period and

prior to the crime (2d Pen. Tr. 339). The substances, marihuana and cocaine, contributed to an already impaired and damaged brain and contributed to Mr. Taylor' [sic] inability think and conform his behavior to the law (2d Pen. Tr. 343-352).

At the second postconviction hearing Dr. James H. Straub testified that his evaluation of Mr. Taylor suffers from post-traumatic stress disorder and dissociative disorder (PCR2. TR. 282-285). Mr. Taylor's impairments and poor emotional control enabled Nunley to achieve dominance over Mr. Taylor (PCR2. TR. 282-285). Dr. Straub testified that additional evaluation was needed to confirm his diagnosis (PCR2. TR. 297-298).

With all the mitigation evidence available to a jury in this case, it would be impossible for the State to make a case that in Step 3, the constitutional violation was harmless beyond a reasonable doubt. There was ample evidence of mitigating circumstances that should have been presented to a jury. Mr. Taylor was under the influence of extreme mental or emotional disturbance at the time of the crime. Mr. Taylor was an accomplice in the murder committed by Nunley and his participation was relatively minor. He was under the substantial domination of Nunley at the time of the murder. Finally, because of his mental diseases and defects, Mr. Taylor's ability to conform his conduct to the requirements of the law was substantially impaired. This Court cannot find that a jury of twelve individuals would necessarily have sentenced Mr. Taylor to death.

Finally, in Step 4, the jury must decide under all the circumstances, based on the facts presented, whether to impose the death penalty. As implicitly found in *Whitfield*, this Court recently held that this

step may be found by a judge if the jury deadlocks on the final step of deliberation, *State v. McLaughlin*, — S.W.3d —, WL3906355 (Mo. banc 2008). While this step does not require a finding of fact as described in *Ring*, this Court did not remove the step from initial determination by the jury. The jury can, for any reason or no reason at all, refuse to give the death penalty. They are instructed that they are never compelled to return a verdict of death (MAI-Cr 313.46). The defense need only convince one merciful juror to spare the defendant's life and the jury could return a verdict of life without the possibility of parole under this step.

Mr. Taylor is entitled to relief
under §565.040.2 RSMo.

Under, *Ring*, *Whitfield*, and *Blakely* held that Mr. Taylor's death sentence was unconstitutionally imposed. Therefore, Mr. Taylor should be sentenced to life imprisonment without the possibility of probation or parole. Section 565.040.2 RSMo. provides, in pertinent part:

"In the event that any death sentence imposed pursuant to this chapter is held to be unconstitutional, the trial court which previously sentenced the defendant to death shall cause the defendant to be brought before the court and shall sentence the defendant to life imprisonment without eligibility for probation, parole, or release except by act of the governor . . ."

That is the relief to which Mr. Taylor is entitled, and which Mr. Taylor seeks through this Motion.

This Court has the right and obligation to vindicate Mr. Taylor's right, under the Sixth and Fourteenth Amendments to the United States Constitution to a jury's penalty-phase factual determination. This Court must recognize that Mr. Taylor's sentence of death is unconstitutional in light of *Ring* and its progeny, and must recall its previously issued Mandate affirming that sentence, and must remand the case to the trial court with directions to resentence Mr. Taylor to life without parole.

Conclusion

WHEREFORE, Mr. Taylor respectfully moves this Court to declare §565.006.2 RSMo. unconstitutional, recall the Mandate previously issued in this case, to reverse his unconstitutional sentence of death, and to remand this cause to the trial court with directions that Mr. Taylor be re-sentenced to imprisonment for life without eligibility for probation, parole, or release except by act of the Governor or other remedy that this Court deems appropriate.

Respectfully submitted,

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[LETTERHEAD OF CLERK OF THE SUPREME COURT
STATE OF MISSOURI]

November 25, 2008

Mr. Robert W. Lundt
Office of Public Defender
Suite 300
1000 St. Louis Union Station
St. Louis, Missouri 63103

In re: State of Missouri, Respondent, vs. Michael
Taylor, Appellant. Missouri Supreme Court No.
SC77365

Dear Counsel:

Please be advised that the Court entered the following order on this date in above-entitled cause:

“Appellant’s motion to recall the mandate overruled.”

Yours very truly,

THOMAS F. SIMON

/s/ KATHY K. FLETCHALL

Kathy K. Fletchall
Deputy Clerk, Court en Banc

cc: Mr. Mark A. Thornhill and Ms. Danielle A. Curtiss
Mr. John W. Simon
Ms. Elizabeth U. Carlyle
Ms. Ginger Andres, Mr. Eric Berger,
Mr. Matthew S. Hellman, and
 Mr. Donald B. Verrilli, Jr.
Mr. C. John Pleban and Ms. Lynette M. Petruska
Mr. Stephen D. Hawke

Mo. Stat. 565.006 Waiver of jury trial permitted, when

1. At any time before the commencement of the trial of a homicide offense, the defendant may, with the assent of the court, waive a trial by jury and agree to submit all issues in the case to the court, whose finding shall have the force and effect of a verdict of a jury. Such a waiver must include a waiver of a trial by jury of all issues and offenses charged in the case, including the punishment to be assessed and imposed if the defendant is found guilty.
2. No defendant who pleads guilty to a homicide offense or who is found guilty of a homicide offense after trial to the court without a jury shall be permitted a trial by jury on the issue of the punishment to be imposed, except by agreement of the state.
3. If a defendant is found guilty of murder in the first degree after a jury trial in which the state has not waived the death penalty, the defendant may not waive a jury trial of the issue of the punishment to be imposed, except by agreement with the state and the court.
4. Any waiver of a jury trial and agreement permitted by this section shall be entered in the court record.